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JUDICIAL INTERVENTION AS JUDICIAL RESTRAINT

Guy-Uriel E. Charles* & Luis E. Fuentes-Rohwer**

In *Gill v. Whitford*,¹ the Supreme Court turned aside the most promising vehicle for adjudicating partisan gerrymandering claims since the Court first fully addressed the issue more than thirty years ago in *Davis v. Bandemer*.² Though the Court has long been deeply divided on the constitutionality of partisan gerrymandering, especially on the threshold question of justiciability, Justice Kennedy, the decisive fifth vote and the Court's then-resident super median,³ previously signaled, explicitly and strongly, his willingness to adjudicate these claims if putative plaintiffs would present him with judicially manageable standards.⁴ The plaintiffs in *Gill* took up that challenge.

The *Gill* plaintiffs filed suit against a redistricting plan from the State of Wisconsin that, by almost all measures, constituted a successful attempt by the Republican Party to minimize the ability of Democrats to translate their electoral votes into legislative seats.⁵ The plaintiffs, armed with a new test — the efficiency gap⁶ — prevailed in the lower

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** Professor of Law and Harry T. Ice Faculty Fellow, Indiana University Bloomington, Maurer School of Law. We received great feedback, on very short notice, from Stuart Benjamin, Corinne Blalock, Joseph Blocher, James Boyle, Curtis Bradley, James Gardner, Don Herzog, Jay Krishnan, Margaret Lemos, Richard Pildes, Steve Sanders, and Timothy Waters. Casandra Laskowski, Reference Librarian and Lecturing Fellow at Duke Law School, helped us tremendously by tracking down important sources. Ellie Hylton and Bailey Sanders provided invaluable research assistance. We are extremely grateful to the staff of the *Harvard Law Review* for superb comments on earlier drafts.

¹ 138 S. Ct. 1916 (2018).

² 478 U.S. 109 (1986).

³ Lee Epstein & Tonja Jacobi, *Super Medians*, 61 STAN. L. REV. 37, 41 (2008).

⁴ See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring in the judgment). Justice Kennedy described the necessity of a workable standard for measuring the burden of gerrymandering on representational rights for justiciability. *Id.* at 307–08.

⁵ See *Gill*, 138 S. Ct. at 1923–24.

⁶ The “efficiency gap” is a measure of partisan symmetry. “The efficiency gap assumes that the strategy of the dominant party, the party in control of the districting, is to group its voters as efficiently as possible and to group the voters of the out party as inefficiently as possible.” JAMES A. GARDNER & GUY-URIEL CHARLES, *ELECTION LAW IN THE AMERICAN POLITICAL SYSTEM* 309 (2d ed. 2018). The efficiency gap was introduced by a political scientist, Eric McGhee, see Eric McGhee, *Measuring Partisan Bias in Single-Member District Electoral Systems*, 39 LEGIS. STUD. Q. 55, 68 (2014), and extended into law by McGhee and Professor Nicholas Stephanopoulos, see Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 834 (2015); see also Nicholas O. Stephanopoulos & Eric M. McGhee, Essay, *The Measure of a Metric: The Debate over Quantifying Partisan Gerrymandering*, 70 STAN. L. REV. 1503, 1505–06 (2018).

court.⁷ Moreover, the issue of partisan gerrymandering appeared to have finally galvanized broad popular opposition.⁸

Gill looked like the perfect opportunity for the Court to address the political gerrymandering question once and for all. As further evidence of what seemed to be the Court's intention to strike down egregious political gerrymanders, the Supreme Court agreed to hear a political gerrymandering case from Maryland, *Benisek v. Lamone*.⁹ The Court also had a third case pending from North Carolina, *Rucho v. Common Cause*,¹⁰ in which a three-judge court concluded that North Carolina's 2016 redistricting plan, to which plaintiffs raised statewide and district-by-district gerrymandering challenges, was a partisan gerrymander in violation of the Equal Protection Clause, the First Amendment, and the Elections Clause.¹¹ The Maryland case was particularly noteworthy because the plaintiffs challenged a district gerrymandered by the Maryland Democratic Party.¹² Taken together, *Gill* and *Benisek* presented the Court with gerrymandering claims by both major political parties and would have provided cover from cries of partisan favoritism. The cases also presented the Court with two gerrymandering claims of different scale. The *Gill* plaintiffs focused on how their state's plan affected political power throughout the state,¹³ and the *Benisek* plaintiffs focused on how the composition of a particular district affected their right to vote.¹⁴ In addition, the two cases presented the Court with two different constitutional theories of the problem, one based upon the Equal Protection Clause and First Amendment associational rights¹⁵ and the other focused on a First Amendment retaliation claim.¹⁶ Between them, *Gill* and *Benisek* provided the Court a range of options for a narrow or broad intervention. And if the Court wanted to strengthen its justifications for intervention and further expand its options, it had an ace in the hole with *Rucho*, which combined all of the issues presented in *Gill* and *Benisek* in a single case.¹⁷ It seemed plausible and even ineluctable that the Court was about to subject the increasingly despised partisan gerrymander to meaningful judicial review.

⁷ See *Whitford v. Gill*, 218 F. Supp. 3d 837, 843, 854–55 (W.D. Wis. 2016).

⁸ *Supermajority of Americans Want Supreme Court to Limit Partisan Gerrymandering*, CAMPAIGN LEGAL CTR. (Sept. 11, 2017), <https://campaignlegal.org/press-releases/supermajority-americans-want-supreme-court-limit-partisan-gerrymandering> [<https://perma.cc/M5XQ-2XW2>].

⁹ 138 S. Ct. 1942 (2018) (per curiam).

¹⁰ 138 S. Ct. 2679 (2018) (mem.).

¹¹ *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 597–98, 608–09 (M.D.N.C. 2018); see also U.S. CONST. amend. XIV, § 1; *id.* amend. I; *id.* art. I, § 4.

¹² *Benisek v. Lamone*, 266 F. Supp. 3d 799, 809–10 (D. Md. 2017).

¹³ *Gill*, 138 S. Ct. at 1922–23.

¹⁴ *Benisek*, 138 S. Ct. at 1943.

¹⁵ *Gill*, 138 S. Ct. at 1924.

¹⁶ *Benisek*, 266 F. Supp. 3d at 801.

¹⁷ *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 597 (M.D.N.C. 2018).

To the surprise of many, the Court did not rule on the constitutionality of political gerrymandering claims. The Court anticlimactically resolved *Gill* on standing grounds. Writing for a unanimous Court,¹⁸ Chief Justice Roberts explained that according to the plaintiffs' theory of their constitutional injury — that they were “placed in legislative districts deliberately designed to ‘waste’ their votes in elections where their chosen candidates will win in landslides (packing) or are destined to lose by closer margins (cracking)” — they must allege and prove their constitutional injury at the district level.¹⁹ The Court remanded the case to allow plaintiffs to show standing.²⁰ The Court's decision in *Benisek* was even more prosaic. The Court simply affirmed the lower court's decision to deny the plaintiffs' motion for an injunction.²¹ Furthermore, in *Rucho*, the Court vacated the lower court's decision and remanded the case for reconsideration in light of its decision in *Gill*.²² Bubbles burst.

As if the Court's decisions in *Gill*, *Benisek*, and *Rucho* were not enough to cast a pall on the festive parade expected to accompany the resolution of the cases, Justice Kennedy announced his retirement from the Court at the end of the Term. Justice Kennedy's departure, and the unlikely prospect that his replacement will join the Court's liberal bloc on this issue, seem to signal the end of the road for political gerrymandering claims for the foreseeable future.

To us, however, it is too premature to write off judicial supervision of political gerrymandering claims. There are clearly some Justices who do not believe that political gerrymandering claims are justiciable, particularly Justices Thomas and Gorsuch.²³ There are also clearly some Justices who believe that these cases are justiciable, particularly Justices Ginsburg, Breyer, Sotomayor, and Kagan.²⁴ As importantly, there is no doubt that Chief Justice Roberts is not yet convinced that the Court bears an institutional responsibility to address the problem of partisan gerrymandering. Indeed, he seemed disdainful of the proposition, which he attributed to the plaintiffs, that “[t]he Court should exercise its power here because it is the ‘only institution in the United States’ capable of

¹⁸ Justices Thomas and Gorsuch joined all but the last part of Chief Justice Roberts's opinion, which remanded the case and gave the plaintiffs another opportunity on remand to demonstrate standing. See *Gill*, 138 S. Ct. at 1933–34. Justices Thomas and Gorsuch would have dismissed the plaintiffs' claims. See *id.* at 1941 (Thomas, J., concurring in part and concurring in the judgment).

¹⁹ *Gill*, 138 S. Ct. at 1930 (majority opinion) (“To the extent the plaintiffs' alleged harm is the dilution of their votes, that injury is district specific.”).

²⁰ *Id.* at 1934.

²¹ *Benisek v. Lamone*, 138 S. Ct. 1942, 1945 (2018) (per curiam).

²² *Rucho v. Common Cause*, 138 S. Ct. 2679 (2018) (mem.) (vacating and remanding to district court).

²³ See *Gill*, 138 S. Ct. at 1941 (Thomas, J., concurring in part and concurring in the judgment).

²⁴ See *id.* at 1945 (Kagan, J., concurring).

‘solv[ing] this problem.’”²⁵ We presume that this is one of the reasons why Justice Kagan spent part of her concurring opinion in *Gill* articulating the harms caused by partisan gerrymandering and making the case in favor of judicial intervention.²⁶

Nevertheless, notwithstanding Chief Justice Roberts’s, and perhaps Justice Alito’s, skepticism about the utility of judicial supervision of partisan gerrymandering claims, it is also significant that they did not vote in *Gill* to hold partisan gerrymandering claims nonjusticiable. Rather than dismiss the case, as Justices Thomas and Gorsuch urged, they joined the liberal Justices and agreed to send the litigants back to the lower court to resolve the standing issues.²⁷ The fact that the Court decided the case on standing grounds and provided political gerrymandering plaintiffs another opportunity to make their case is indicative that some of the Justices who are skeptical of judicial supervision are nevertheless worried, and rightly so, about the implications of nonintervention. They are not yet persuaded that there is a problem to which the Court ought to provide a solution; but they also have an intuition that nonintervention is a significant abdication of judicial responsibility. They need more time to further contemplate a justification for engagement on what they clearly view as a consequential decision. Deciding *Gill* on standing grounds and remanding the case is a holding-pattern maneuver.

We join a growing consensus among an impressive group of election law scholars who argue that partisanship is a problem in districting and that the Court is authorized by the Constitution to intervene.²⁸ We advance two novel claims. First, in Part I, we provide a comprehensive

²⁵ *Id.* at 1929 (majority opinion) (second alteration in original) (quoting Transcript of Oral Argument at 62, *Gill*, 138 S. Ct. 1916 (No. 16-11161), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-11161_mjno.pdf [<https://perma.cc/JBL5-TRVA>]).

²⁶ *See id.* at 1940–41 (Kagan, J., concurring). The dialogue seems to have taken a step backward. Instead of arguing about whether political gerrymandering claims are best adjudicated under the First or Fourteenth Amendments, or whether the efficiency gap adequately captures the harm of political gerrymandering, we are debating whether political gerrymandering claims cause constitutional harms at all and whether those harms are sufficient to compel the Court to intervene.

²⁷ *See id.* at 1934 (majority opinion); *id.* at 1941 (Thomas, J., concurring in part and concurring in the judgment).

²⁸ *See, e.g.*, Christopher S. Elmendorf, *From Educational Adequacy to Representational Adequacy: A New Template for Legal Attacks on Partisan Gerrymanders*, 59 WM. & MARY L. REV. 1601, 1605–07 (2018); Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351, 353–56 (2017); Justin Levitt, *Intent Is Enough: Invidious Partisanship in Redistricting*, 59 WM. & MARY L. REV. 1993, 2024–31 (2018) [hereinafter Levitt, *Intent Is Enough*]; Justin Levitt, *The Partisanship Spectrum*, 55 WM. & MARY L. REV. 1787, 1816–19 (2014); Nicholas O. Stephanopoulos, *The Causes and Consequences of Gerrymandering*, 59 WM. & MARY L. REV. 2115, 2118–20 (2018); Daniel P. Tokaji, *Gerrymandering and Association*, 59 WM. & MARY L. REV. 2159, 2162–64 (2018). There are some important dissenting voices. For one of the most creative and compelling, see Franita Tolson, *Benign Partisanship*, 88 NOTRE DAME

account of the Court's skepticism of judicial supervision of democratic politics, an account that we call the narrative of nonintervention. We situate *Gill v. Whitford* and the Court's recent political gerrymandering cases within this narrative and argue that the debate over standing, jurisdiction, and judicially manageable standards is a red herring. The Court has previously offered the same set of objections in analogous contexts: specifically, when it refused to intervene to protect African Americans against widespread racial discrimination in the political process²⁹ and when it refused to intervene to address the problem of grossly malapportioned districts.³⁰ Neither standing doctrine, nor the absence or presence of judicially manageable standards, nor jurisdiction determined judicial intervention in those prior moments. Rather, the Court's reluctance to intervene was a function of the Court's institutional calculus that it ought to protect its stature and institutional capital when it engages in what look like political fights. The lesson of Part I is that the Court's refusal to intervene to address the problems of racial disenfranchisement and malapportionment — its narrative of nonintervention in those contexts — yielded to the current conditions of governance. In both the race and malapportionment contexts, the Court overcame its initial skepticism and responded to the needs of the time.

In Part II, we argue that the Court's posture of nonintervention in the political gerrymandering cases should yield as a consequence of the political reality of our moment, a political environment characterized by extreme partisan polarization. Though the justiciability of partisan gerrymandering claims is often supported by strong normative claims, we argue, on utilitarian grounds, that the Court ought to occasionally make strategic interventions in the domain of law and politics, such as limiting partisan gerrymandering, where doing so is reasonably likely to avoid future problems that would lead to greater interventions. Thus, the Court ought to articulate a principle against partisanship in the construction of electoral structures because curbing partisan gerrymandering would have the benefit of curtailing a lot of other kinds of manipulations in the electoral system that are driven by the same type of partisan impulse that motivates partisan gerrymandering claims. The other kinds of manipulations we have in mind include voter identification rules, voter registration rules, voter purge practices, racial gerrymandering, election administration practices, disputes about the location of polling places, and the like. For ease of exposition, we refer to

L. REV. 395, 397–99 (2012); and Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, 2010 UTAH L. REV. 859, 888–90.

²⁹ See *Giles v. Harris*, 189 U.S. 475, 486–88 (1903).

³⁰ See *Colegrove v. Green*, 328 U.S. 549, 552 (1946).

these types of claims as secondary claims or secondary disputes.³¹ Ironically, and contra the narrative of nonintervention, judicial intervention in this context is an act of judicial restraint because it obviates the need for the Court to take sides later on substantive partisan disputes that would arguably arise as a result of unconstrained state actors' partisan manipulation of electoral rules. Counterintuitively, this argument advances a utilitarian or instrumental conception of judicial restraint. The Court can do a little now — rein in partisan gerrymandering — so it can do a lot less later — by deterring some forms of bad behavior it would otherwise have to deal with on the merits.

I. *GILL V. WHITFORD* AND THE NARRATIVE OF NONINTERVENTION

Gill v. Whitford is nominally a case about standing. *Gill* is best understood within a line of cases in which the Court articulated its reluctance to police the political process and its justifications for its posture of nonintervention. We call this articulation the narrative of nonintervention. *Gill* thus reflects two sentiments in tension with one another. On the one hand, rooted within the narrative of nonintervention, the Court is skeptical that judicial review of partisan gerrymandering claims is necessary. On the other hand, the Court seems to intuit that judicial abdication would be problematic and is trying to come to terms with the implications of nonintervention for the democratic process and for the Court as an institution.³² The Court is ambivalent about the proper course, and *Gill* is a prudential reflection of this ambivalence. Section A explains the contours of the narrative of nonintervention. Section B turns to *Gill* and explains the Court's standing analysis as a function of its ambivalence, the pull of the narrative of nonintervention, and the fear of nonintervention's potential toll on the democratic process. Section C critiques the narrative of nonintervention as devoid of analytic content. The point of the narrative is simply that the Court is concerned about its stature and its political capital.

A. *The Narrative*

There is a story that the Court tells when it does not want to supervise the ground rules of democratic politics. It goes something like this: The Court cannot intervene in political cases because to do so would be to insert itself unjustifiably in political and policy decisions that are

³¹ Justice Kagan astutely noted her concerns with the secondary effects of partisan gerrymandering in *Gill*. As she stated, “the evils of gerrymandering seep into the legislative process itself,” which makes it harder for political actors to “negotiat[e] and compromise” and to “reach[] pragmatic, bipartisan solutions to the nation’s problems.” *Gill*, 138 S. Ct. at 1940 (Kagan, J., concurring). Among the “evils of gerrymandering” is the desire to manipulate electoral rules, not just electoral districts, to maintain political power at all costs.

³² See *id.* at 1931 (majority opinion).

reserved for the democratic process and not for judges. It cannot intervene because the Constitution protects only individual rights and does not permit judges to concern themselves with the distribution of power among groups or with the design of democratic institutions. Though it can intervene on behalf of racial minorities, it cannot intervene to protect political parties. It cannot intervene where it does not have an *ex ante* rule that cabins its discretion. The Court told us this story, in a slightly modified version, when it was asked to protect rights of political participation against racial discrimination; when it was asked to address malapportionment; and when it was asked to address partisan gerrymandering. The Court's core concern is not about individual rights, race, or rules, but that it is corrosive of the Court's institutional capital and legitimacy if the Court engages in the political process by supervising the ground rules of democratic politics. This is the narrative of nonintervention.

The narrative has taken so strong a hold in the legal imagination that it is hard to remember a world without it. We can trace its roots to Justice Holmes in the anticanonical *Giles v. Harris*.³³ In *Giles*, a black voter from Alabama, Jackson W. Giles, sued county election officials for denying him and other black voters the right to register and to vote, in violation of the Fourteenth and Fifteenth Amendments.³⁴ At the beginning of the twentieth century, Alabama amended its constitution as part of a statewide scheme to deprive African Americans of the right to vote and effectively to nullify the Reconstruction Amendments.³⁵ The disenfranchisement was effectuated through the application of voting restrictions that were discriminatorily applied so that they would have minimal impact on white voters and maximum impact on the state's African American population, as well as through grandfather clauses that would have the effect of exempting whites but not African Americans from certain requirements.³⁶

The Court dismissed Mr. Giles's claims on jurisdictional grounds. Justice Holmes argued that the Court did not have the power to provide the equitable relief requested by the plaintiff, stating that "equity cannot undertake . . . to enforce political rights."³⁷ According to Justice Holmes, the plaintiffs alleged "that the great mass of the white population intends to keep the blacks from voting."³⁸ If so, Justice Holmes

³³ 189 U.S. 475. For the first and most thorough examination of *Giles*, see Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295 (2000). Professor Pildes argues that *Giles* should be restored from obscurity and ought to be central to the constitutional law and race-and-law fields. *Id.* at 317–19.

³⁴ *Giles*, 189 U.S. at 482.

³⁵ See Pildes, *supra* note 33, at 301–04.

³⁶ See *id.* at 302–03.

³⁷ *Giles*, 189 U.S. at 487.

³⁸ *Id.* at 488.

concluded, “relief from a great political wrong . . . by the people of a State and the State itself[] must be given by them or by the legislative and political department of the government of the United States.”³⁹

The Court explicitly voiced its unwillingness to find jurisdiction in 1946, in the better-known case of *Colegrove v. Green*.⁴⁰ In *Colegrove*, Justice Frankfurter famously concluded that the Court did not have jurisdiction to address Illinois’s malapportioned congressional districts.⁴¹ Justice Frankfurter approached the issue with his characteristic bluntness. He stated that malapportionment claims did not implicate individual rights, such as the denial of the franchise on the basis of race.⁴² Rather, the Court, citing *Giles*, stated that the case was an attempt to vindicate “a wrong suffered by Illinois as a polity.”⁴³ Consequently, the case could not be resolved “by verbal fencing about ‘jurisdiction.’”⁴⁴ These disputes are about “politics, in the sense of party contests and party interests.”⁴⁵ As such, the Court should stay away because “[i]t is hostile to a democratic system to involve the judiciary in the politics of the people.”⁴⁶ He concluded that “[t]he Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights.”⁴⁷ Justice Frankfurter’s message was clear and direct: in order to preserve the Court’s stature and legitimacy as a legal institution, the Court “ought not to enter this political thicket.”⁴⁸

The Court overcame this ambivalence in *Baker v. Carr*⁴⁹ with a mere turn to the Equal Protection Clause. The plaintiffs in *Baker* argued that Tennessee’s malapportioned state legislative districts were justiciable under the Fourteenth Amendment,⁵⁰ and in an opinion by Justice Brennan — and over a vociferous dissent by Justice Frankfurter⁵¹ —

³⁹ *Id.*

⁴⁰ 328 U.S. 549 (1946).

⁴¹ *Id.* at 552.

⁴² *See id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 554; *see also id.* at 553 (“Nothing is clearer than that this controversy concerns matters that bring courts into immediate and active relations with party contests. From the determination of such issues this Court has traditionally held aloof.”).

⁴⁶ *Id.* at 553–54.

⁴⁷ *Id.* at 556.

⁴⁸ *Id.*

⁴⁹ 369 U.S. 186 (1962).

⁵⁰ *Id.* at 187–88.

⁵¹ *See id.* at 266–67 (Frankfurter, J., dissenting) (“The Court today reverses a uniform course of decision established by a dozen cases, including one by which the very claim now sustained was unanimously rejected only five years ago.”).

the Court agreed.⁵² But *Baker* did not fully expiate the Court's ambivalence, nor did *Baker* indicate how far the Court would go in policing the ground rules of democratic politics.

Gaffney v. Cummings,⁵³ a 1973 challenge to a Connecticut bipartisan gerrymander,⁵⁴ is an apt example. The Court in *Gaffney* seemed bemused by the claim that the redistricting plan in question violated the Equal Protection Clause because it "was drawn with the conscious intent to . . . achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties."⁵⁵ The majority explained that "[i]t would be idle . . . to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it."⁵⁶ The Court was not skeptical of the plaintiffs' claim because political gerrymandering claims were nonjusticiable⁵⁷ — the preoccupation with the justiciability of political gerrymandering claims was a later development. The Court was skeptical because the plaintiffs' claim amounted to a complaint that the plaintiffs had been assigned to electoral districts simply to produce an intended political outcome.⁵⁸ The Court could not imagine a situation where partisan politics would be removed from the design of electoral districts.⁵⁹ To have sustained their complaint, plaintiffs would have needed to show not simply that the political process had produced a political outcome, but that the line-drawers had minimized or canceled out their political strength by creating districts with large variations in population.⁶⁰ Because the Connecticut redistricting plan provided plaintiffs with roughly proportional representation, the plaintiffs could not make such a showing.⁶¹

Thirteen years later, when the Court next addressed a partisan gerrymander in *Davis v. Bandemer*, the Justices seemed less bemused and more frustrated. In *Bandemer*, plaintiffs challenged Indiana's apportionment plan on partisan gerrymandering grounds, arguing that their voters were diluted by Republican partisans in charge of the redistricting process.⁶² Importantly, a majority agreed that the claim was

⁵² See *id.* at 237 (majority opinion).

⁵³ 412 U.S. 735 (1973).

⁵⁴ See *id.* at 736–40.

⁵⁵ *Id.* at 752.

⁵⁶ *Id.*

⁵⁷ See *id.* at 754 ("What is done in so arranging for elections, or to achieve political ends or allocate political power, is not wholly exempt from judicial scrutiny . . .").

⁵⁸ See *id.* at 751–52.

⁵⁹ See *id.* at 753 ("Politics and political considerations are inseparable from districting and apportionment.").

⁶⁰ *Id.* at 743–44 (citing *Reynolds v. Sims*, 377 U.S. 533, 568, 577–79 (1964)).

⁶¹ See *id.* at 750–51.

⁶² 478 U.S. 109, 115 (1986) (plurality opinion).

justiciable.⁶³ But the Court could not agree on much more. Writing for a plurality, Justice White concluded that the plaintiffs could not show that they had been subjected to unconstitutional treatment.⁶⁴ To have proven a constitutional violation, Justice White argued, the plaintiffs would have needed to show both discriminatory intent and discriminatory effect.⁶⁵ Justice White thought that, in general, a showing of discriminatory intent “should not be very difficult to prove.”⁶⁶ The question for the Justices — a question that remains to this day — was about proving unconstitutional discriminatory effect. According to the plurality, discriminatory effect “occurs only when the electoral system is arranged in a manner that will consistently degrade a voter’s or a group of voters’ influence on the political process as a whole.”⁶⁷ The plaintiffs in *Bandemer* could not prevail because they could not show that their influence was consistently degraded.⁶⁸

The conclusion that political gerrymandering claims are justiciable provoked a very sharp and influential response by Justice O’Connor.⁶⁹ Her argument against justiciability relied upon a series of dichotomous principles,⁷⁰ which have set the terms for the debate over judicial supervision of democratic politics and have also served as a rough guide indicating when judicial supervision of democratic politics is warranted. These principles largely mirrored the concerns of Justice Frankfurter, the chief advocate of judicial abstention and Justice O’Connor’s intellectual forebear, who made the case successfully against supervision in *Colegrove v. Green* but famously lost in *Baker v. Carr*.

Bandemer evidenced and presaged what would become a fundamental and long-lasting divide on the Court with respect to two essential questions: whether political gerrymandering claims are justiciable, and if so, what the nature of the constitutional harm might be. That divide was on full display eighteen years later when Justice Scalia rehearsed Justice O’Connor’s four dichotomous principles from *Bandemer* with almost perfect pitch in his plurality opinion in *Vieth v. Jubelirer*.⁷¹

⁶³ *Id.* at 125 (majority opinion).

⁶⁴ *Id.* at 143 (plurality opinion).

⁶⁵ *Id.* at 127.

⁶⁶ *Id.* at 129. Justice White thought proving discriminatory intent ought to be easy because “[t]he reality is that districting inevitably has and is intended to have substantial political consequences.” *Id.* (quoting *Gaffney*, 412 U.S. at 753). Also quoting *Gaffney*, Justice White repeated: “Politics and political considerations are inseparable from districting and apportionment.” *Id.* at 128 (quoting *Gaffney*, 412 U.S. at 753).

⁶⁷ *Id.* at 132.

⁶⁸ *Id.* at 134–37.

⁶⁹ *Id.* at 144 (O’Connor, J., concurring in the judgment).

⁷⁰ See *infra* pp. 246–50.

⁷¹ 541 U.S. 267 (2004). Justice Scalia authored the opinion that announced the judgment of the Court but the reasoning of a plurality of Justices. Four Justices — Chief Justice Rehnquist and Justices O’Connor, Scalia, and Thomas — concluded that political gerrymandering claims were

1. *Law and Politics.* — The first set of dichotomous principles is the law-politics tension. Justice O'Connor argued in *Bandemer* that political gerrymandering claims were nonjusticiable because they were inherently about partisan politics, not law.⁷² In her view, "the legislative business of apportionment is fundamentally a political affair, and challenges to the manner in which an apportionment has been carried out — by the very parties that are responsible for this process — present a political question in the truest sense."⁷³ Like the Court in *Gaffney*, she could not imagine that redistricting could be nonpartisan or apolitical. As Justice O'Connor noted: "The opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States"⁷⁴ She contended that fundamental choices about governance belong to the political process and not to the courts.⁷⁵ One can hear echoes of Justice Frankfurter in *Colegrove*, where he stated emphatically that "[i]t is hostile to a democratic system to involve the judiciary in the politics of the people."⁷⁶ Like Justice Frankfurter, Justice O'Connor worried that "[t]o turn these matters over to the federal judiciary is to inject the courts into the most heated partisan issues."⁷⁷

Justice Scalia picked up the same law-politics refrain in *Vieth*. He began his analysis by quoting Chief Justice Marshall's famous proposition in *Marbury v. Madison* — "[i]t is emphatically the province and duty of the judicial department to say what the law is"⁷⁸ — but his main point is Frankfurterian. Shadowing Justice Frankfurter, Justice Scalia wrote that "[s]ometimes . . . the law is that the judicial department has no business entertaining the claim of unlawfulness — because the question is entrusted to one of the political branches or involves no judicially enforceable rights."⁷⁹ Or as Justice Frankfurter put it: "The

nonjusticiable. *Id.* at 305–06. And four Justices concluded that political gerrymandering claims were justiciable; that group consisted of Justices Stevens, Souter, Ginsburg, and Breyer. *See id.* at 317–18 (Stevens, J., dissenting); *id.* at 346 (Souter, J., dissenting); *id.* at 355 (Breyer, J., dissenting). Justice Kennedy concurred in the judgment. Even though he agreed that the plaintiffs' claim ought to be dismissed, he would not foreclose the possibility that the Court might eventually develop judicially manageable standards. *Id.* at 306 (Kennedy, J., concurring in the judgment). Consequently, he was not prepared to conclude that political gerrymandering claims were nonjusticiable. *See id.* at 316–17.

⁷² *Bandemer*, 478 U.S. at 144–45 (O'Connor, J., concurring in the judgment).

⁷³ *Id.* at 145.

⁷⁴ *Id.*

⁷⁵ *Id.* ("I do not believe, and the Court offers not a shred of evidence to suggest, that the Framers of the Constitution intended the judicial power to encompass the making of such fundamental choices about how this Nation is to be governed.").

⁷⁶ *Colegrove v. Green*, 328 U.S. 549, 553–54 (1946) (plurality opinion).

⁷⁷ *Bandemer*, 478 U.S. at 145 (O'Connor, J., concurring in the judgment).

⁷⁸ *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004) (plurality opinion) (alteration in original) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

⁷⁹ *Id.*

Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action.”⁸⁰ Redistricting belongs to the political process, and a political process naturally produces political outcomes.⁸¹

2. *Individual Rights and Structure.* — The second set of dichotomous principles is the individual rights–structural rights divide. Non-interventionists have generally argued that the only proper purpose of judicial review of democratic politics is to vindicate violations of individual rights.⁸² Correspondingly, noninterventionists have also argued that judicial review should not be deployed to guard against the maldistribution of political power among groups or to direct the manner in which political power is exercised through the institutions that structure and shape democratic politics.⁸³ This belief results from the fact that the maldistribution of political power or the institutional arrangements of democratic politics reflects structural rights, which are not protected by the Constitution.

Justice O’Connor sided with the noninterventionists and argued that in the domain of law and democracy, the Constitution is concerned only with individual rights violations.⁸⁴ In her view, the Framers did not carve out a role for courts to adjudicate structural rights.⁸⁵ Accordingly, political gerrymandering claims are not cognizable under the Constitution because political gerrymandering claims do not vindicate individual rights, but rather, they call into question the distribution of power among groups and the institutional arrangements that channel political power in the polity.⁸⁶ Consequently, courts do not have a legal basis for arbitrating political power among groups or for restructuring political institutions.⁸⁷ Aware of the weight of reapportionment cases, Justice

⁸⁰ *Colegrove*, 328 U.S. at 556.

⁸¹ For powerful and persuasive rebuttals to the view that partisanship is a necessary condition of the redistricting process, see Kang, *supra* note 28, at 366–75; Levitt, *Intent is Enough*, *supra* note 28, at 2024–31.

⁸² See, e.g., *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) (noting that malapportionment claims are “a wholly different matter from denial of the franchise to individuals because of race, color, religion or sex”); see generally RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* 10, 79–100 (2003).

⁸³ See, e.g., *Baker*, 369 U.S. at 284–85 (Frankfurter, J., dissenting) (“The Court has been particularly unwilling to intervene in matters concerning the structure and organization of the political institutions of the States.” *Id.* at 284.).

⁸⁴ *Davis v. Bandemer*, 478 U.S. 109, 147–52 (1986) (O’Connor, J., concurring in the judgment).

⁸⁵ *Id.* at 147 (noting that group rights do not present a harm that the Constitution recognizes because “no group right to an equal share of political power was ever intended by the Framers of the Fourteenth Amendment”).

⁸⁶ *Id.* at 149 (“The rights asserted in this case are *group* rights to an equal share of political power and representation”); *id.* at 155.

⁸⁷ *Id.* at 155.

O'Connor argued that those cases were inapposite in the political gerrymandering context because the "right asserted [in those cases] was an individual right to a vote whose weight was not arbitrarily subjected to 'debasement.'"⁸⁸

This rights-structure distinction also arose in *Vieth*. The plaintiffs in *Vieth* argued the state violates the Constitution by drawing district lines "with a predominant intent to achieve partisan advantage."⁸⁹ The plaintiffs additionally accepted that political gerrymandering claims require discriminatory effect, which they argued is met when district lines crack and pack voters because of the voters' political identity and where the totality of circumstances shows that the voters are less able to translate their votes into legislative seats.⁹⁰ Justice Scalia took issue with the plaintiffs' effects standard on the ground that it "rests upon the principle that groups . . . have a right to proportional representation."⁹¹ This is not a constitutional principle, he argued, because the Constitution "guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups. It nowhere says that farmers or urban dwellers, Christian fundamentalists or Jews, Republicans or Democrats, must be accorded political strength proportionate to their numbers."⁹²

3. *Race and Politics*. — The third dichotomy is between race and politics. The animating idea of the race-politics dichotomy is that race is simply different (or maybe an exception). Within the parameters of this dichotomy, claims that allege racial discrimination in the political process are justiciable, but claims that allege political or partisan discrimination are not. A central question is whether racial identity and partisan identity are sufficiently similar such that the Constitution should treat racial and partisan gerrymanders symmetrically. In *Bandemer*, Justice O'Connor reasoned that the Court's precedents on racial vote dilution and racial gerrymandering do not authorize the Court to resolve partisan gerrymandering claims.⁹³ Justice O'Connor offered three reasons to distinguish claims by racial groups from claims by parties.

First, by citing Justice Frankfurter's dissent in *Baker*, Justice O'Connor argued that the Fourteenth and Fifteenth Amendments were promulgated specifically to address the problem of racial discrimination and, with respect to the Fifteenth Amendment, specifically the problem

⁸⁸ *Id.* at 149 (quoting *Baker*, 369 U.S. at 194).

⁸⁹ *Vieth v. Jubelirer*, 541 U.S. 267, 284 (2004) (plurality opinion) (emphasis omitted) (quoting Brief for Appellants at 19, *Vieth*, 541 U.S. 267 (No. 02-1580) (emphasis added)).

⁹⁰ *Id.* at 286-87.

⁹¹ *Id.* at 288.

⁹² *Id.*

⁹³ *Bandemer*, 478 U.S. at 151-52 (O'Connor, J., concurring in the judgment).

of racial discrimination in voting.⁹⁴ Consequently, they provide a textual directive to courts and a justification for courts to supervise the use of race in the design of electoral districts.⁹⁵ Justice Scalia similarly argued in *Vieth* that “[a] purpose to discriminate on the basis of race receives the strictest scrutiny under the Equal Protection Clause, while a similar purpose to discriminate on the basis of politics does not.”⁹⁶ Additionally, “our country’s long and persistent history of racial discrimination in voting — as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race —” supports the supposition that racial gerrymanders are subject to a higher level of scrutiny than political ones.⁹⁷

Second, Justice O’Connor explained that racial groups are different from parties because racial minorities “are a discrete and insular group vulnerable to exclusion from the political process by some dominant group.”⁹⁸ Unlike racial groups, the major “political parties *are* the dominant groups,” able to protect themselves in the political process.⁹⁹ Moreover, race is an immutable characteristic, whereas partisan identity is not.¹⁰⁰

Third, Justice O’Connor maintained that protecting political parties from the diminution of their political power would ultimately evolve into a right of proportional political representation, a right not found in the Constitution.¹⁰¹ Therefore, Justice O’Connor concluded that racial identity and partisan identity are not comparable identity categories for constitutional purposes.¹⁰² The Court has a constitutional reason for guaranteeing the political equality of racial groups that it does not have for political groups.

4. *Rules and Standards.* — Finally, the fourth tension is best articulated as a rules-standards distinction. The language the Court uses, “judicially manageable standards,”¹⁰³ seems to focus the inquiry on the existence of “standards” as opposed to “rules” to adjudicate political gerrymandering claims. But the language of “judicially manageable standards” is a term of art.¹⁰⁴ The Court’s jurisprudence reveals a search for

⁹⁴ *Id.* at 151.

⁹⁵ *Id.* at 151–52.

⁹⁶ 541 U.S. at 293 (plurality opinion).

⁹⁷ *Id.* (quoting *Shaw v. Reno*, 509 U.S. 630, 650 (1993)).

⁹⁸ *Bandemer*, 478 U.S. at 152 (O’Connor, J., concurring in the judgment).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 156.

¹⁰¹ *Id.* at 156–58.

¹⁰² *Id.* at 160–61.

¹⁰³ *Baker v. Carr*, 369 U.S. 186, 226 (1962).

¹⁰⁴ See Luis Fuentes-Rohwer, *Who’s Afraid of the Hated Political Gerrymander?*, 104 KY. L.J. 561, 562, 566 (2016).

ex ante *rules* to cabin the discretion of courts and preclude judges from using their public policy preferences to decide claims of political rights. As Justice Scalia declared emphatically, but also confusingly, in *Vieth*, the judicial power under Article III requires that “judicial action must be governed by *standard*, by *rule*.”¹⁰⁵ “Rule” is meant to qualify “standard.” Given that there is no rule available, that is, a “reasoned distinction[]” to constrain judicial discretion and policy preferences, the federal courts do not have power to hear these claims.¹⁰⁶

This emphasis on rules was a leading theme in Justice O’Connor’s opinion in *Bandemer*, where she derided “the nebulous standard a plurality of the Court fashions today,”¹⁰⁷ a standard that would allow the Court to enact its public policy choices into law. The *Bandemer* plurality argued that it was simply following the path of *Baker*, which made reapportionment claims justiciable and subject to equal protection standards.¹⁰⁸ But in Justice O’Connor’s view, the standard developed in *Baker* was deeply flawed. She argued that *Baker* adopted a nebulous “arbitrary and capricious” standard that “threatened to prove unmanageable,” save for the fact that “the difficulty was pretermitted when a relatively simple and judicially manageable requirement of population equality among districts was adopted . . . in *Reynolds v. Sims*.”¹⁰⁹ *Baker*, like the plurality in *Bandemer*, relied upon a nebulous standard, whereas *Reynolds*¹¹⁰ fashioned a rule. From Justice O’Connor’s perspective, the best the plurality could do was to emulate *Baker*, which was not good enough.¹¹¹ Thus, political gerrymandering claims were not justiciable because no rule was available.¹¹²

B. Gill as Placeholder

Using the framework of the narrative of nonintervention, we can better understand the Court’s decision in *Gill v. Whitford*. Nominally, *Gill* is a standing case. In order to have standing, a plaintiff must show (a) that she has suffered an injury in fact; (b) that the defendant caused the plaintiff’s injury; and (c) that the injury is redressable if the plaintiff prevails.¹¹³ The most important element is the injury-in-fact requirement, which the Court has interpreted to mean that the plaintiff must plead and show that the defendant’s conduct has infringed upon “a

¹⁰⁵ *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion).

¹⁰⁶ *Id.*

¹⁰⁷ 478 U.S. at 145 (O’Connor, J., concurring in the judgment).

¹⁰⁸ *Id.* at 118 (plurality opinion).

¹⁰⁹ *Id.* at 149 (O’Connor, J., concurring in the judgment).

¹¹⁰ *Reynolds v. Sims*, 377 U.S. 533 (1964).

¹¹¹ See *Bandemer*, 478 U.S. at 155 (O’Connor, J., concurring in the judgment).

¹¹² *Id.* at 147 (“The Equal Protection Clause does not supply judicially manageable standards for resolving purely political gerrymandering claims.”).

¹¹³ *Gill*, 138 S. Ct. at 1929.

legally protected interest.”¹¹⁴ Chief Justice Roberts relied upon the plaintiffs’ own theory and articulation of their constitutional harm to argue that the plaintiffs’ “legally protected interest” was the dilution (to borrow from the racial gerrymandering context) or debasement (to borrow a term from the reapportionment context) of their vote for partisan purposes.¹¹⁵ Because Republicans were in charge of the redistricting process, they placed plaintiffs, who identified as Democrats, inside and outside of legislative districts — packed and cracked them — in order to maximize the electoral power of the Republican Party and thereby minimize the plaintiffs’ voting power.¹¹⁶ The Court then went on to conclude unanimously that in order to have standing to challenge the redistricting plan, plaintiffs must show that they live in districts that are either packed or cracked, and that the cracking or packing results in the debasement or dilution of their vote.¹¹⁷ Chief Justice Roberts argued that the plaintiffs did not show that they resided in districts that were packed or cracked, so they did not prove that they suffered an injury in fact.¹¹⁸ Consequently, they did not have standing to bring this claim.

Though a case about standing, *Gill* bears the markers of the narrative of nonintervention. The Court relied on both the law-politics and individual rights—structural rights dichotomies, particularly the latter, as necessary complements of its standing argument. Invoking both distinctions, Chief Justice Roberts stated that the plaintiffs’ case “is a case about group political interests, not individual legal rights The Court’s constitutionally prescribed role is to vindicate the individual rights of the people appearing before it.”¹¹⁹ In stating the importance of standing, the Court invoked the law-politics distinction: standing is a “threshold requirement [that] ‘ensures that we act *as judges*, and do not engage in policymaking properly left to elected representatives.”¹²⁰ And in support of the argument that standing is “district specific,”¹²¹ the Court quoted the reapportionment cases to argue that the “right to vote is ‘individual and personal in nature.’”¹²² Importantly, the Court stated numerous times that the standing inquiry is not focused on structural harms such as the plaintiffs’ “collective representation in the legislature” or their interest in “influencing the legislature’s overall ‘composition and

¹¹⁴ *Id.* (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

¹¹⁵ *Id.* at 1929–30.

¹¹⁶ *Id.* at 1930.

¹¹⁷ *Id.* at 1930–31.

¹¹⁸ *Id.* at 1931–32.

¹¹⁹ *Id.* at 1933.

¹²⁰ *Id.* at 1923 (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 700 (2013)).

¹²¹ *Id.* at 1930.

¹²² *Id.* at 1929 (quoting *Reynolds v. Sims*, 377 U.S. 533, 561 (1964)).

policymaking,”¹²³ or their “abstract interest in policies adopted by the legislature.”¹²⁴

Yet, the Court’s standing analysis left open some unanswered questions. Two particular points are worth noting. First, scholars of the law of democracy universally agree that vote dilution claims are structural claims and not individual rights claims.¹²⁵ Take for example the cracking claim — the contention that the state broke apart a group of voters who would otherwise have constituted a majority of voters in the district and as a consequence made it impossible for those voters, who are now a numerical minority, to elect their candidate of choice. A cracking claim is sensible only as a group right.¹²⁶ As long as an individual is not denied the right to vote, all claims about the composition of the electorate, including racial gerrymandering, malapportionment, and partisan gerrymandering, are structural claims.¹²⁷ The individual rights–structural rights distinction is not a coherent distinction.¹²⁸

Second, *Gill* is unclear about the relationship between standing and the constitutional harm. As Professors Issacharoff and Karlan stated in an analogous context, “a coherent concept of standing grows out of a clear definition of the relevant injury.”¹²⁹ We put the cart before the horse when we talk about standing without defining the injury.¹³⁰ *Gill* is an anomaly in the Court’s law and politics jurisprudence as the rare case where the Court has addressed the question of standing without first addressing whether there is a constitutional or legal claim. Prior to *Gill*, standing doctrine had not been determinative in any of the Court’s forays into the political thicket. Standing did not matter when the Court decided the reapportionment cases,¹³¹ or when the Court intervened in

¹²³ *Id.* at 1931 (quoting Brief for Appellees at 31, *Gill*, 138 S. Ct. 1916 (No. 16-1161)).

¹²⁴ *Id.*

¹²⁵ Perhaps the foundational article here is Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor’s Clothes*, 71 TEX. L. REV. 1589, 1636 (1993). See also Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1727 (2001); Samuel Issacharoff & Pamela S. Karlan, *Groups, Politics, and the Equal Protection Clause*, 58 U. MIAMI L. REV. 35, 40–42, 45 (2003).

¹²⁶ This is also true for packing claims.

¹²⁷ See, e.g., Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 645–46 (1998); Richard H. Pildes, Commentary, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1606 (1999).

¹²⁸ For an important account, see Richard H. Pildes, *The Supreme Court, 2003 Term — Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 55–83 (2004).

¹²⁹ Samuel Issacharoff & Pamela S. Karlan, Commentary, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276, 2288 (1998).

¹³⁰ Justice Kagan recognized this problem in her concurring opinion when she noted that the lower court will have to decide what evidence is relevant for the plaintiffs to show standing “without guidance from this Court[on] what elements make up a vote dilution claim in the partisan gerrymandering context.” *Gill*, 138 S. Ct. at 1937 (Kagan, J., concurring).

¹³¹ See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964).

the 2000 presidential election in *Bush v. Gore*.¹³² Standing did not matter when the Court recognized an “analytically distinct” claim in *Shaw v. Reno*,¹³³ the racial gerrymandering case.¹³⁴ Indeed, in the *Shaw* line of cases, the Court first decided whether there was a constitutional injury — which has been understood as an “expressive harm”¹³⁵ — and then two years later, in *United States v. Hays*,¹³⁶ addressed the standing question.¹³⁷

How then can we make sense of the Court’s decision in *Gill* to decide the case on standing grounds? In our view, the Court’s standing analysis reflects a skepticism of some members of the Court and a deep disagreement about the justiciability of the plaintiffs’ claim, a skepticism rooted in the narrative of nonintervention. Standing doctrine is a prudential artifact that allows the justices to take up and evade questions as they deem necessary and appropriate.¹³⁸ Chief Justice Roberts’s opinion is peppered with aphorisms that serve as admonitions about the limits and limitations of the Court’s power.¹³⁹ A unanimous decision on standing by a Court that is clearly divided on the justiciability of these claims reflects a Court that is not yet ready to square up to the justiciability question. Characterizing *Gill* as a standing case blithely masks the Court’s deep ambivalence and disagreement with respect to the merits of the case.

Ambivalence, however, has two sides. Although it is true that the Court has strong reservations about entering this part of the political thicket, it is also true that the Court is not yet ready to abdicate this field altogether. The Court could have followed the nonintervention script and dismissed these cases on the ground that there are no judicially manageable standards. In the alternative, it could have remanded the case to the lower court with instructions to dismiss on jurisdictional grounds, as Justices Thomas and Gorsuch believed was required by

¹³² 531 U.S. 98 (2000).

¹³³ 509 U.S. 630 (1993).

¹³⁴ *Id.* at 652.

¹³⁵ Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 506 (1993).

¹³⁶ 515 U.S. 737 (1995).

¹³⁷ *Id.* at 738–39.

¹³⁸ See Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1204–05 (2002).

¹³⁹ See, e.g., *Gill*, 138 S. Ct. at 1929 (“Our power as judges . . . is . . . grounded in and limited by the necessity of resolving, according to legal principles, a plaintiff’s particular claim of legal right.”); *id.* (noting that standing functions “[t]o ensure that the Federal Judiciary respects ‘the proper — and properly limited — role of the courts in a democratic society’” (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984))).

longstanding precedents.¹⁴⁰ Instead, by refusing to shut the door altogether, the Court gave all political gerrymandering plaintiffs — not just the *Gill* plaintiffs — another bite at the apple on the theory that “[t]his is not the usual case. It concerns an unsettled kind of claim this Court has not agreed upon, the contours and justiciability of which are unresolved.”¹⁴¹

Deciding *Gill* on standing grounds and remanding the case is a holding-pattern maneuver. The Court is deadlocked on justiciability, ambivalent about where to go next. Chief Justice Roberts acknowledged as much.¹⁴² The Court is clearly not yet persuaded that there is an injury or that it has a role to play in addressing that injury, but it also has some intuition that nonintervention is a significant abdication of judicial responsibility. In order to follow that intuition, it needs to shed the burden of the narrative of nonintervention.

C. *The Critique*

This narrative of nonintervention has served as a conceptual and ultimately doctrinal straightjacket for proponents of judicial review of partisan gerrymandering claims. The narrative of nonintervention relies upon supposedly categorical distinctions that are presented as outcome determinative when they are not. Examples of the permeability of the categories, and how they simply reflect a default assumption of nonintervention, abound.

Take first the race-party pairing, the argument that the Court is authorized to protect racial minorities but not political parties. In *Giles v. Harris*, the Court refused to intervene in order to protect the rights of African Americans.¹⁴³ But in *Lane v. Wilson*,¹⁴⁴ a case indistinguishable from *Giles*, Justice Frankfurter wrote an opinion preventing Oklahoma from doing to African American voters precisely what it allowed Alabama to do in *Giles*.¹⁴⁵ Justice Frankfurter attempted to distinguish the two

¹⁴⁰ See *id.* at 1941 (Thomas, J., concurring in part and concurring in the judgment).

¹⁴¹ *Id.* at 1933–34 (majority opinion).

¹⁴² As he stated, “[o]ver the past five decades this Court has been repeatedly asked to decide what judicially enforceable limits, if any, the Constitution sets on the gerrymandering of voters along partisan lines Our efforts to sort through those considerations have generated conflicting views both of how to conceive of the injury arising from partisan gerrymandering and of the appropriate role for the Federal Judiciary in remedying that injury.” *Id.* at 1926.

¹⁴³ 189 U.S. 475, 488 (1903).

¹⁴⁴ 307 U.S. 268 (1939).

¹⁴⁵ In *Lane*, an African American citizen of Oklahoma, I.W. Lane, sued county officials for denying him the right to register and vote because he was black. *Id.* at 271. Mr. Lane was the victim of a registration scheme that used a grandfather clause to allow white voters to register for life but to disenfranchise black voters. *Id.* The grandfather clause was struck down in *Guinn v. United States*, 238 U.S. 347 (1915), but it was essentially reenacted with the same effect. *Lane*, 307 U.S. at 269–71. Following *Guinn*, Oklahoma enacted a statute that allowed those disenfranchised by the grandfather clause the opportunity to register if they did so between April 30 and May 11, 1916.

cases on the grounds that *Lane* was about racial discrimination and *Giles* was about political participation.¹⁴⁶ Given the factual similarities between the two cases, that distinction is patently unpersuasive.¹⁴⁷ Moreover, even if Justice Frankfurter could distinguish *Giles* from *Lane*, he could not distinguish *Giles* from *Gomillion v. Lightfoot*,¹⁴⁸ a case in which African American plaintiffs challenged Alabama's redistricting scheme that removed almost all of the black residents from the City of Tuskegee.¹⁴⁹ Justice Frankfurter authored the opinion for the Court in *Gomillion* and reversed the lower court's decision that the plaintiffs' complaint was nonjusticiable.¹⁵⁰ Justice Frankfurter concluded that the plaintiffs were entitled to vindicate their right to equal treatment and right to vote guaranteed by the Fourteenth and Fifteenth Amendments, respectively.¹⁵¹ Following *Gomillion*, there was no longer any doubt that race cases — even those alleging political rights, such as the right to vote — were firmly within the Court's ambit.¹⁵²

Turn now to the rules-standards dichotomy. Why was race on one side of the dichotomy in 1903,¹⁵³ but on the other side in 1939¹⁵⁴ and 1960?¹⁵⁵ Why was malapportionment on one side of the dichotomy in 1946 in *Colegrove*,¹⁵⁶ but on the other side in 1962 in *Baker*?¹⁵⁷ We

Id. at 270–71. If they failed to register during that time period, they were disenfranchised for life. *Id.* at 271.

¹⁴⁶ *Lane*, 307 U.S. at 274 (“The basis of this action is inequality of treatment . . . not denial of the right to vote.”).

¹⁴⁷ For a further detailed argument that Justice Frankfurter's attempt to distinguish *Giles* and *Lane* is unpersuasive, see Guy-Uriel Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099, 1122–23 (2005) (book review).

¹⁴⁸ 364 U.S. 339 (1960).

¹⁴⁹ *Id.* at 340.

¹⁵⁰ *Id.* at 347–48.

¹⁵¹ See *id.* at 342–47.

¹⁵² The Court's difficulty with clearly distinguishing race cases from politics or party cases is the reason why many scholars have argued that the distinction between racial gerrymandering and political gerrymandering is incoherent. See, e.g., Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Race and Representation Revisited: The New Racial Gerrymandering Cases and Section 2 of the VRA*, 59 WM. & MARY L. REV. 1559, 1596 (2018); Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases*, 59 WM. & MARY L. REV. 1837, 1849–56 (2018); Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 630–31 (2002). For a wonderful rejoinder, see Ellen D. Katz, *Reviving the Right to Vote*, 68 OHIO ST. L.J. 1163, 1163–66 (2007) (defending the racialization of partisan claims).

¹⁵³ *Giles v. Harris*, 189 U.S. 475, 486–88 (1903) (declaring a rule that equity could not step in for the state to enforce political rights such as voting registration).

¹⁵⁴ *Lane v. Wilson*, 307 U.S. 268, 275 (1939) (holding for plaintiffs under a standard that determined that a statute bore too close a resemblance to a grandfather clause that was invalid under the Fifteenth Amendment).

¹⁵⁵ *Gomillion*, 364 U.S. at 346–48 (applying a legal standard that found that a state discriminated based on race).

¹⁵⁶ *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (declaring a rule against justiciability).

¹⁵⁷ *Baker v. Carr*, 369 U.S. 186, 209 (1962) (holding that malapportionment cases were justiciable).

cannot explain these cases on rules-standards terms. Note that Justice Holmes's reason for noninterference in *Giles* is almost identical to that provided by Justice Frankfurter more than forty years later in *Colegrove*, except for the fact that *Colegrove* was about malapportionment and not race. It is the same story that Justices O'Connor and Scalia told in *Bandemer* and *Vieth*, respectively, except that those cases were not about race or malapportionment, which were by then within the purview of judicial review, but about partisan gerrymandering, which was decidedly not. In 1903, the Court would not intervene to protect African Americans against the deprivation of their political rights — until the Court did; because this was a problem of the political process — until it was not. In 1946, the Court would not intervene to protect voters against the debasement of their vote by malapportionment — until the Court did; because this was a problem of the political process — until it was not.

The argument about judicially manageable standards is inapposite here because the Court did not develop or rely on any new standards in *Lane* or *Gomillion*. Rather, the Court simply told the local white communities so feared by Justice Holmes in *Giles* to stop discriminating. The Court also did not develop judicially manageable standards between *Colegrove* and *Baker*. Recall Justice O'Connor's point that when the Court decided that malapportionment claims were justiciable in *Baker*, it did so without a judicially manageable standard.¹⁵⁸ The Court did not "discover" one until *Reynolds v. Sims*, two years later.¹⁵⁹

Consider these cases in the context of the politics-law dichotomy. If the Court's change in posture in *Lane*, with respect to race, and *Baker*, with respect to malapportionment, was not a function of the availability of "judicially manageable standards," does this then mean that the Court was doing politics in *Lane* and *Gomillion*? No one today lauds Justice Holmes's decision in *Giles*.¹⁶⁰ By contrast, the Court's decisions in *Lane* and *Gomillion* have few detractors. Similarly, though no one today questions the appropriateness of judicial review of malapportionment, are we to conclude that *Baker* is an unconstitutional intervention in democratic politics because there were no judicially manageable standards when the Court decided the case?

Finally, take the rights-structure divide. Recall Justice O'Connor's characterization of the reapportionment cases in *Bandemer* as cases that vindicated individual rights and not structural rights.¹⁶¹ This characterization is understandable, yet striking. It is understandable because a contrary conclusion would have compelled Justice O'Connor to con-

¹⁵⁸ *Davis v. Bandemer*, 478 U.S. 109, 148 (1986) (O'Connor, J., concurring in the judgment).

¹⁵⁹ See 377 U.S. 533, 568 (1964).

¹⁶⁰ See, e.g., Pildes, *supra* note 33, at 305–07.

¹⁶¹ 478 U.S. at 149–52 (O'Connor, J., concurring in the judgment).

cede the argument to Justice White in *Bandemer* that the reapportionment cases were controlling precedent and thus that political gerrymandering cases ought to be justiciable. Given the similarities between reapportionment claims and partisan gerrymandering claims, opponents of judicial review of partisan gerrymandering claims are continually tasked with distinguishing them. We can understand why Justice O'Connor would view the reapportionment cases as individual rights cases.

However, Justice O'Connor's characterization of reapportionment claims as individual rights claims is a reclassification of the reapportionment cases and betrays a core element of Justice Frankfurter's objection, in *Colegrove* and *Baker*, to judicial intervention in reapportionment cases. Justice Frankfurter's main argument against justiciability was that reapportionment claims were structural claims — claims that challenged the structural arrangements of representative institutions. As he stated in *Colegrove*, the basis for the harm was not that an individual was deprived of a right to vote, but that the state suffered harm as a polity.¹⁶² As many commentators have argued, Justice Frankfurter was certainly right that apportionment claims (along with race claims and political gerrymandering claims) are structural claims and not individual rights claims.¹⁶³ By reclassifying the reapportionment cases as individual rights claims in her *Bandemer* opinion, Justice O'Connor essentially moved the goalposts.

The narrative of nonintervention is like a fairy tale, and contains an important lesson: the Court must be concerned about its legitimacy and political capital.¹⁶⁴ Not surprisingly, Justice Frankfurter famously articulated the point in his dissent in *Baker*:

The Court's authority — possessed of neither the purse nor the sword — ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.¹⁶⁵

¹⁶² *Colegrove v. Green*, 328 U.S. 549, 552 (1946) (“This is not an action to recover for damage because of the discriminatory exclusion of a plaintiff from rights enjoyed by other citizens. The basis for the suit is not a private wrong, but a wrong suffered by Illinois as a polity. In effect this is an appeal to the federal courts to reconstruct the electoral process of Illinois in order that it may be adequately represented in the councils of the Nation.” (citations omitted)).

¹⁶³ See, e.g., Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 511–12 (2004).

¹⁶⁴ As Professor John Hart Ely put it, the Court's concern is that the idea that it should supervise the ground rules of democratic politics is “unusually calculated to get the Court in trouble, dangerously to decrease its prestige.” JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 121 (1980).

¹⁶⁵ *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting). This led Justice Clark to retort: “National respect for the courts is more enhanced through the forthright enforcement of

Chief Justice Roberts also articulated his worry in *Gill* in similar terms. As he stated at oral argument, unless the Court can explain to the “intelligent man on the street” why it is adjudicating partisan claims, the Court risks “caus[ing] very serious harm to the status and integrity of the decisions of this Court in the eyes of the country.”¹⁶⁶

However, the narrative does not decide actual cases. It simply reflects the Court’s conclusion that the Constitution does not provide judicially manageable standards for resolving political gerrymandering claims — a conclusion whose terms are offered as a magical incantation designed to ward off the evil spirit of judicial intervention. Because the categories do not do the analytical work that the Court assumes they do, the narrative of nonintervention sends putative plaintiffs on a fool’s errand. As the Court appears to cry out for satisfactory standards, plaintiffs willingly offer anything and everything that has the possibility of bringing respite, like parents attempting to placate a fussy baby, only to have the baby petulantly spit out any and all offerings while demanding more.

II. JUDICIAL SUPERVISION OF DEMOCRATIC POLITICS IN THE AGE OF PARTISANSHIP

Scholars of law and democracy have advanced a number of justifications for judicial supervision of the ground rules of democratic politics.¹⁶⁷ These justifications share one common theme: they identify a pathology within the political process and urge the Court to provide a remedy because the political process is unable to fix itself.¹⁶⁸ However, these theories misunderstand the narrative of nonintervention. While they do a very good job of articulating why political gerrymandering is bad for the political process, they are nonetheless unresponsive to the Court’s core concern. The Court is not asking whether judicial engagement would be good for the political process — in fact, it eschews that inquiry — it is asking whether judicial engagement is bad for the Court. Additionally, the theories treat the Court as if it resides outside the political process, unaffected by the pathology identified within the system. This is a view “of the Court as a *deus ex machina*, an exogenous force, the god that would deliver us all from the predicaments created by our political rulers.”¹⁶⁹ Professors Eric Posner and Adrian Vermeule identify

[representational] rights rather than by rendering them nugatory through the interposition of subterfuges.” *Id.* at 262 (Clark, J., concurring).

¹⁶⁶ Transcript of Oral Argument, *supra* note 25, at 38.

¹⁶⁷ See, e.g., Yasmin Dawood, *The Antidomination Model and the Judicial Oversight of Democracy*, 96 GEO. L.J. 1411 (2008).

¹⁶⁸ E.g., *id.* at 1416–17.

¹⁶⁹ Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Reynolds Reconsidered*, 67 ALA. L. REV. 485, 525 (2015).

this problem as the “inside/outside fallacy.”¹⁷⁰ Thus, the theories are incomplete in at least two respects: they are not responsive to the Court’s core concern — that intervention is bad for the Court — and they do not avoid the inside/outside fallacy.

In this Part, we respond to both shortcomings. We argue that if the Justices are concerned about judicial restraint and how the mass public perceives the Court, they must, paradoxically, curb partisan gerrymandering as a way of limiting the partisan manipulation of electoral rules across other domains of election law. In a political environment characterized by tribal or negative partisanship,¹⁷¹ political elites have a stronger incentive to rig electoral rules to maximize a favorable outcome.¹⁷² Political losers will turn to the courts to vindicate their rights. As a consequence, the courts will be continually enmeshed in partisan fights. A rule against partisan excess in the gerrymandering context might not simply limit partisanship in gerrymandering but might also eliminate it in related domains, which would save the Court from having to referee these secondary partisan fights. Just as importantly, the Court cannot evade questions of partisan bias as simply as some Justices might wish. While Chief Justice Roberts openly worried that judicial involvement might lead “the intelligent man on the street”¹⁷³ to perceive the Court as partisan, he should be concerned about noninvolvement as a

¹⁷⁰ See Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1745 (2013). As they explain, the fallacy occurs when theorists flip between “an external perspective that attempts to explain the behavior of actors within the constitutional order as an endogenous product of self-interested aims, and an internal perspective that assumes the standpoint of the judge and asks how the judge ought to behave so as to promote the well-being of the constitutional system and the nation.” *Id.* at 1744; see also *id.* at 1745.

¹⁷¹ Professor Justin Levitt defines tribal partisanship as a preference for “public action purely because the policy in question is perceived to benefit those with a shared partisan affiliation, or because the policy in question is perceived to injure partisan opponents, wholly divorced from — or stronger yet, contrary to — the policymaker’s conception of the policy’s other merits.” Levitt, *The Partisanship Spectrum*, *supra* note 28, at 1798.

¹⁷² We are not the first to be concerned with the problem that extreme polarization poses to the various domains of election law. See, e.g., Heather K. Gerken, Commentary, *Playing Cards in a Hurricane: Party Reform in an Age of Polarization*, 54 HOUS. L. REV. 911, 917–20 (2017); Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 WM. & MARY L. REV. 415, 424–25 (2004); Samuel Issacharoff, Address, *Outsourcing Politics: The Hostile Takeover of Our Hollowed-Out Political Parties*, 54 HOUS. L. REV. 845, 855 (2017); Kang, *supra* note 28, at 356; Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2338–41 (2006); Levitt, *Intent Is Enough*, *supra* note 28, at 2047–51; Levitt, *The Partisanship Spectrum*, *supra* note 28, at 1816–19; Richard H. Pildes, Feature, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 808–10 (2014); Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 273–74 (2011); David Schleicher, *Things Aren’t Going That Well over There Either: Party Polarization and Election Law in Comparative Perspective*, 2015 U. CHI. LEGAL F. 433, 434–35 (2015). But whereas others worry about the effects of hyperpartisanship on the political process, we are concerned with the consequences of hyperpartisanship for the Court itself.

¹⁷³ Transcript of Oral Argument, *supra* note 25, at 37.

signal to political elites and the mass public that the Court is in fact an accomplice in “the new politics of voter suppression.”¹⁷⁴ In enforcing a rule against partisanship, ironically, the Court will also protect itself against charges of partisanship. Thus, prohibiting partisanship in gerrymandering is not simply a normative good; it is also an exercise of judicial restraint by limiting the Court’s prospective entanglement in partisan fights.

Our argument is divided in two parts. The first part describes the realities of modern democratic practices in our hyperpartisan age. The second part turns Justice Frankfurter’s presumption on its head. Whereas Justice Frankfurter famously worried about the dangers of intervention, we argue that judicial supervision of political gerrymandering claims is a prudential move that could curb the deployment of partisanship in areas outside of the domain of political gerrymandering.

A. *Parties and Partisanship in Modern American Politics*

Classical democratic theory envisions campaigns and elections as real contests of ideas that ought to turn on substantive issues.¹⁷⁵ Voters are expected to vote for candidates and parties depending upon the candidates’ and parties’ stance on the issues of the day.¹⁷⁶ Additionally, in the classical account, the voter is positioned horizontally vis-à-vis her representative. There is a clear sense of who is the principal — the voter — and who is the agent — the representative.¹⁷⁷ Minimalist democratic theories expect much less of voters.¹⁷⁸ The role of voters in the minimalist account is to choose among competitors vying for the right to exercise political power.¹⁷⁹ In either the classical or minimalist account, authority flows from principal to agent. The principal is thought

¹⁷⁴ SPENCER OVERTON, *STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION* (2006); see also CAROL ANDERSON, *ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY* (2018); TOVA ANDREA WANG, *THE POLITICS OF VOTER SUPPRESSION: DEFENDING AND EXPANDING AMERICANS’ RIGHT TO VOTE* (2012).

¹⁷⁵ See, e.g., JAMES A. GARDNER, *WHAT ARE CAMPAIGNS FOR?: THE ROLE OF PERSUASION IN ELECTORAL LAW AND POLITICS* 13 (2009) (“We take it for granted today that campaigns for elective office ought to be deliberative. Candidates, we believe, ought to inform voters of the facts, offer thoughtful positions on serious issues, and work hard to persuade voters of the merits of their positions and qualifications so as to earn any support they receive.”).

¹⁷⁶ Professors Christopher Achen and Larry Bartels refer to this as the “folk theory” of democracy. CHRISTOPHER H. ACHEN & LARRY M. BARTELS, *DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT* 1 (2016).

¹⁷⁷ See, e.g., Samuel Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV. 1627, 1636–39 (1999).

¹⁷⁸ See generally ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 124–37 (1956); GIOVANNI SARTORI, *DEMOCRATIC THEORY* 96–110 (1962); JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 269–83 (1942).

¹⁷⁹ See, e.g., SCHUMPETER, *supra* note 178, at 269.

to have the capacity to hold the agent accountable, or retroactively approve the decisions of the agent by making a merit-based evaluation of the agent's decision.¹⁸⁰ Not to tax our linguistic syntax and our conceptual categories too significantly, modern democratic theory assumes that the voter is "agentic," a political agent capable of making and expected to make merit-based decisions.

Notwithstanding the expectations of democratic theory, its assumptions are severely strained by the realities of contemporary democratic practice. Democratic politics have become so partisan and tribal that, on average, voters are unlikely to make merit-based evaluations of their political rulers. Because voters increasingly frame their political evaluations through a partisan lens, we cannot expect them to serve the basic checking function that our theories of democracy expect of voters.

American political parties and American political elites are more divided along partisan and ideological lines than they have been in a very long time.¹⁸¹ Moreover, and perhaps more importantly, though there are important dissenting voices,¹⁸² there is a growing literature demonstrating that polarization among the mass public increasingly mirrors polarization among the elite.¹⁸³ Americans have sorted themselves into partisan camps. Taking their cues from the ruling class, voters have

¹⁸⁰ See MORRIS P. FIORINA, RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS 129, 201 (1981); HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 47–48 (1967); Jane Mansbridge, *Rethinking Representation*, 97 AM. POL. SCI. REV. 515, 516 (2003).

¹⁸¹ See, e.g., NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, POLARIZED AMERICA 23–24 (2006); Joseph Bafumi & Robert Y. Shapiro, *A New Partisan Voter*, 71 J. POL. 1, 3 (2009).

¹⁸² See MORRIS P. FIORINA WITH SAMUEL J. ABRAMS, DISCONNECT: THE BREAKDOWN OF REPRESENTATION IN AMERICAN POLITICS 20 (2009); MATTHEW LEVENDUSKY, THE PARTISAN SORT: HOW LIBERALS BECAME DEMOCRATS AND CONSERVATIVES BECAME REPUBLICANS 77 (2009); Paul DiMaggio, John Evans & Bethany Bryson, *Have Americans' Social Attitudes Become More Polarized?*, 102 AM. J. SOC. 690, 739–45 (1996) (concluding that there has not been great polarization in public opinion on social issues since the 1970s).

¹⁸³ As one scholar stated clearly and emphatically: "America is polarized. Our political parties are highly polarized and the American electorate is highly polarized. . . . The polarization of the American electorate is real and widespread. . . . America is a politically divided nation, it has been so for some time, and has become more so in recent decades." JAMES E. CAMPBELL, POLARIZED: MAKING SENSE OF A DIVIDED AMERICA 1–2 (2016); see also ALAN I. ABRAMOWITZ, THE POLARIZED PUBLIC?: WHY AMERICAN GOVERNMENT IS SO DYSFUNCTIONAL *passim* (2013). One of the best explanations of the phenomenon of polarization is provided by Professor Lilliana Mason and her account of social polarization. She argues that the emotions and behavior of the electorate, wholly apart from its members' policy choices, evince increased polarization. LILLIANA MASON, UNCIVIL AGREEMENT: HOW POLITICS BECAME OUR IDENTITY 77 (2018). Americans manifest a distinctive prejudice and anger toward members of the other party "that grows out of the increasing alignment between our partisan, ideological, racial, and religious social identities." *Id.* She observes that "[a]n electorate that increasingly treats its political opponents as enemies, with ever-growing levels of prejudice, offensive action, and anger, is a clear sign of partisan polarization occurring within the citizenry." *Id.*

aligned their political ideology with the appropriate political party.¹⁸⁴ On average, conservatives are also Republicans and liberals are also Democrats.¹⁸⁵ There is also very strong evidence that the more politically knowledgeable or engaged members of the public are undeniably polarized and virtually indistinguishable from political elites.¹⁸⁶ Additionally, our partisan identities also correspond with our social and demographic identities.¹⁸⁷ On average, you are likely a Democrat if you are a person of color (African American, Latino, Asian, or Native American), or a gender minority, or Jewish, or secular, or young.¹⁸⁸ Conversely, you are likely a Republican if you are white, or older, or an evangelical Protestant, or living in certain parts of the country.¹⁸⁹ As the author of a recent and comprehensive study explained:

The American electorate has sorted itself into two increasingly homogenous parties, with a variety of social, economic, geographic, and ideological cleavages falling in line with the partisan divide. This creates two megaparties, with each party representing not only policy positions but also an increasing list of other social cleavages. Parties, then, draw convenient battle lines between an array of social groups.¹⁹⁰

Political scientists and political psychologists have identified two different types of partisan divisions. The first is ideological polarization, which describes the fact that Americans are predictably divided along

¹⁸⁴ MORRIS P. FIORINA WITH SAMUEL J. ABRAMS & JEREMY C. POPE, *CULTURE WAR?: THE MYTH OF A POLARIZED AMERICA* 11–32 (3d ed. 2011); LEVENDUSKY, *supra* note 182, at 77; Marc J. Hetherington, *Resurgent Mass Partisanship: The Role of Elite Polarization*, 95 AM. POL. SCI. REV. 619, 622–23, 627–29 (2001).

¹⁸⁵ See, e.g., CAMPBELL, *supra* note 183, at 145–46; LEVENDUSKY, *supra* note 182.

¹⁸⁶ ALAN I. ABRAMOWITZ, *THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY* 15–61 (2010).

¹⁸⁷ For thorough treatments, see ALAN I. ABRAMOWITZ, *THE GREAT ALIGNMENT: RACE, PARTY TRANSFORMATION, AND THE RISE OF DONALD TRUMP* 101–20 (2018); MASON, *supra* note 183, at 61–77.

¹⁸⁸ See PEW RES. CTR., *A DEEP DIVE INTO PARTY AFFILIATION: SHARP DIFFERENCES BY RACE, GENDER, GENERATION, EDUCATION* 1 (2015). On the relationship between religion and partisan identity, see ABRAMOWITZ, *supra* note 183, at 68–77; JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* 42–48 (1991); GEOFFREY LAYMAN, *THE GREAT DIVIDE: RELIGIOUS AND CULTURAL CONFLICT IN AMERICAN PARTY POLITICS* 68–74 (2001); Geoffrey C. Layman, *Religion and Political Behavior in the United States: The Impact of Beliefs, Affiliations, and Commitment from 1980 to 1994*, 61 PUB. OPINION Q. 288, 295 (1997). On the relationship between race and partisan identity, see generally EDWARD G. CARMINES & JAMES A. STIMSON, *ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS* 47–54 (1989); Maruice Mangum, *The Racial Underpinnings of Party Identification and Political Ideology*, 94 SOC. SCI. Q. 1222 (2013). On gender, see Barry C. Burden, *The Social Roots of the Partisan Gender Gap*, 72 PUB. OPINION Q. 55, 56–60 (2008); Karen M. Kaufmann, *Culture Wars, Secular Realignment, and the Gender Gap in Party Identification*, 24 POL. BEHAV. 283, 285–86 (2002).

¹⁸⁹ See sources cited *supra* note 188.

¹⁹⁰ MASON, *supra* note 183, at 19–20.

ideological and partisan lines.¹⁹¹ The second is affective or social polarization, which describes the fact that Americans are at least as much divided by their sociodemographic identities as their policy differences.¹⁹² The title of a recent paper identified the emotion that opposing partisans have for each other as “[f]ear and [l]oathing.”¹⁹³ And if the title were not sufficiently alarming, the well-respected researchers concluded that: “Compared with the most salient social divide in American society — race — partisanship elicits more extreme evaluations and behavioral responses to ingroups and outgroups.”¹⁹⁴ Partisan animus rivals, and perhaps surpasses, racial animus in both belief and motivation for behavior. This is due to the nonapplicability of egalitarian norms:

These norms, which are supported by large majorities, discourage the manifestation of behavior that may be construed as discriminatory. In contemporary America, the strength of these norms has made virtually any discussion of racial differences a taboo subject to the point that citizens suppress their true feelings. No such constraints apply to evaluations of partisan groups.¹⁹⁵

Put differently, though not less alarmingly, “American partisans today are prone to stereotyping, prejudice, and emotional volatility.”¹⁹⁶ “These phenomena are increasing quickly” and are “defined by prejudice, anger, and activism on behalf of that prejudice and anger.”¹⁹⁷ Partisans hate each other.

Not surprisingly, partisans respond to facts differently and interpret facts consistently with their partisan priors. As a political scientist strikingly noted, “partisanship is a powerful and pervasive influence on perceptions of political events.”¹⁹⁸ We live in a political environment in which it makes less and less sense to inquire about what Americans think of a particular public policy issue. Voters understand their position on the issues of the day through their partisan identities and take their cues on public policy issues from political elites.¹⁹⁹ Political psychologists and political scientists have explained the role of partisanship

¹⁹¹ See, e.g., ABRAMOWITZ, *supra* note 183, at 36–61.

¹⁹² See, e.g., MASON, *supra* note 183, at 32–44; Shanto Iyengar, Gaurav Sood & Yphtach Lelkes, *Affect, Not Ideology: A Social Identity Perspective on Polarization*, 76 PUB. OPINION Q. 405, 405–07 (2012); Shanto Iyengar & Sean J. Westwood, *Fear and Loathing Across Party Lines: New Evidence on Group Polarization*, 59 AM. J. POL. SCI. 690, 703–05 (2015).

¹⁹³ Iyengar & Westwood, *supra* note 192.

¹⁹⁴ *Id.* at 703.

¹⁹⁵ *Id.* at 704 (citation omitted).

¹⁹⁶ MASON, *supra* note 183, at 4.

¹⁹⁷ *Id.*

¹⁹⁸ Larry M. Bartels, *Beyond the Running Tally: Partisan Bias in Political Perceptions*, 24 POL. BEHAV. 117, 120 (2002).

¹⁹⁹ See, e.g., *id.* at 138; James N. Druckman et al., *How Elite Partisan Polarization Affects Public Opinion*, 107 AM. POL. SCI. REV. 57, 74 (2013); Peter K. Enns & Gregory E. McAvoy, *The Role of Partisanship in Aggregate Opinion*, 34 POL. BEHAV. 627, 648 (2012); Geoffrey Evans & Mark

in political decisionmaking as largely attributable to partisan-motivated reasoning.²⁰⁰ According to one prominent study:

[P]artisans in a polarized environment follow their party regardless of the type or strength of the argument that the party makes. Moreover, when individuals engage in strong partisan motivated reasoning, they develop increased confidence in their opinions. This means they are less likely to consider alternative positions and more likely to take action based on their opinion.²⁰¹

Thus, the relevant inquiry is not: What do Americans think about a particular issue? Rather, the inquiry is: What do Republicans and Democrats think? Furthermore, what the rank-and-file Republican or Democrat thinks about a particular public policy issue is often strongly influenced, if not determined, by the cues the rank and file receive from partisan elites and how the issue has been framed by these elites.²⁰²

To be sure, the use of partisanship as a basis for evaluation can be normatively defended.²⁰³ For example, parties are useful heuristics that minimize the voter's information deficit. However, when partisanship becomes the exclusive basis for substantive evaluations, voters are not expected to provide democratic accountability. My party is correct — because it is my party — right or wrong.²⁰⁴

Pickup, *Reversing the Causal Arrow: The Political Conditioning of Economic Perceptions in the 2000–2004 U.S. Presidential Election Cycle*, 72 J. POL. 1236, 1247 (2010); Brian J. Gaines et al., *Same Facts, Different Interpretations: Partisan Motivation and Opinion on Iraq*, 69 J. POL. 957, 971–72 (2007); Paul Goren, *Character Weakness, Partisan Bias, and Presidential Evaluation*, 46 AM. J. POL. SCI. 627, 628–29, 637–39 (2002); Jennifer Jerit & Jason Barabas, *Partisan Perceptual Bias and the Information Environment*, 74 J. POL. 672, 681–82 (2012).

²⁰⁰ See, e.g., Toby Bolsen et al., *The Influence of Partisan Motivated Reasoning on Public Opinion*, 36 POL. BEHAV. 235, 251–52 (2014). For a particularly insightful exploration of the phenomena, see Dan M. Kahan, *Ideology, Motivated Reasoning, and Cognitive Reflection*, 8 JUDGMENT & DECISION MAKING 407 (2013).

²⁰¹ Druckman et al., *supra* note 199, at 74 (citations omitted).

²⁰² On the role of elite opinion in foreign policy, see Richard A. Brody & Catherine R. Shapiro, *Policy Failure and Public Support: The Iran-Contra Affair and Public Assessment of President Reagan*, 11 POL. BEHAV. 353 (1989).

²⁰³ See, e.g., NANCY L. ROSENBLUM, ON THE SIDE OF THE ANGELS: AN APPRECIATION OF PARTIES AND PARTISANSHIP 333–48 (2008); Lisa Disch, *Toward a Mobilization Conception of Democratic Representation*, 105 AM. POL. SCI. REV. 100, 101–02 (2011). For a parsimonious review of the normative defense of this practice, see Thomas J. Leeper & Rune Slothuus, *Political Parties, Motivated Reasoning, and Public Opinion Formation*, 35 ADVANCES POL. PSYCHOL. 129, 132–33 (2014).

²⁰⁴ For a trenchant take on the accountability problem with respect to economic performance, see Christopher J. Anderson, *The End of Economic Voting?: Contingency Dilemmas and the Limits of Democratic Accountability*, 10 ANN. REV. POL. SCI. 271, 281–86 (2007). As one political scientist remarked, dryly, “[i]f partisans simply bend reality to make it fit their preconceptions, holding incumbents accountable . . . seems rather difficult.” Martin Bisgaard, *Bias Will Find a Way: Economic Perceptions, Attributions of Blame, and Partisan-Motivated Reasoning During Crisis*, 77 J. POL. 849, 849 (2015) (citations omitted).

Thus, voters cannot be counted on to be an effective check on the exercise of power by political elites. Indeed, representatives and institutions of representation are not expected to conform to the preferences of the citizen. Instead the citizen is expected to be responsive to the political preferences of her political leaders.²⁰⁵ The voters' role here is purely instrumental: to allow political elites to lay claim to the legitimate exercise of power because they tallied more votes than their political opponents.

Within its proper framework, partisanship is instrumental to democratic politics by, *inter alia*, organizing ideas, mobilizing people, achieving policy goals, giving a voice to citizens, and providing a vehicle to ambitious political elites to channel their political goals.²⁰⁶ In this view, partisanship serves the aims of democratic politics, not the other way around. Partisanship ought to facilitate representation.²⁰⁷

From this perspective, we can easily link the problem of partisanship to the problem of political gerrymandering. Leaving aside the material harm that partisan gerrymandering causes,²⁰⁸ it also violates a norm of constitutional morality both because the practice communicates to political elites that the only thing that matters is partisanship and also because it treats citizens as mere instruments to the ambitions of political elites. Partisanship becomes its own self-justifying appeal. Instead of partisanship being instrumental to the political representation of citizens, citizens become instrumental, as ciphers devoid of political agency, to the acquisition of political power by political elites.²⁰⁹

It is true that one can then say that gerrymandered districts are responsive to the preferences of the majority of citizens and representative

²⁰⁵ See DON HERZOG, *HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY* 179–81, 208–11 (1989).

²⁰⁶ For an introduction, see generally JOHN H. ALDRICH, *WHY PARTIES: THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA* 28–61 (1995); see also Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775, 787 (2000) (examining the place of political parties within the legal landscape).

²⁰⁷ The legal status of parties and thus partisanship must be dependent upon their functional utility for democratic politics. See, e.g., Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 N.Y.U. L. REV. 750, 814 (2001); see also Joseph Fishkin & Heather K. Gerken, *The Party's Over: McCutcheon, Shadow Parties, and the Future of the Party System*, 2014 SUP. CT. REV. 175, 199–208.

²⁰⁸ This is the harm inherent to malapportionment, or vote dilution more generally. See STEPHEN ANSOLABEHRE & JAMES M. SNYDER JR., *THE END OF INEQUALITY: ONE PERSON, ONE VOTE AND THE TRANSFORMATION OF AMERICAN POLITICS* 17 (2008) (documenting the material harms to American politics from malapportionment and the “resulting dramatic changes in political power and public policies that resulted from the Court’s decisions”).

²⁰⁹ This is a form of paternalism that is despotic because it deprives the represented of their autonomy. See NADIA URBINATI, *REPRESENTATIVE DEMOCRACY* 103 (2006) (explaining this Kantian account of representation).

of the views of the electorate.²¹⁰ But as Professor Hanna Pitkin notes, there is a “difference between changing subjects to suit [the] ruler, and changing the ruler to suit his subjects.”²¹¹ And, “[a]djusting what is to represent until it is aligned with what is to be represented may be a part of the activity of representing, but the converse adjustment is not. The leader who molds his followers to suit his aims and interests is, if anything, making them represent him.”²¹² Partisan gerrymandering gets it exactly backward: it does not allow representatives to conform to the preferences of the electorate or face their retrospective judgment, but rather, it enables representatives to choose the electorate to conform to their preferences.

Election law has long been concerned with this instrumental view of representation.²¹³ *Reynolds v. Sims*, in which plaintiffs challenged the malapportionment of Alabama’s state legislative districts,²¹⁴ evinced a clear concern for the political agency of the represented. “Legislators,” Chief Justice Warren wrote for the Court, “are elected by voters, not farms or cities or economic interests.”²¹⁵ In a key passage, Chief Justice Warren argued that “representative government is in essence self-government . . . and each and every citizen has an inalienable right to full and effective participation.”²¹⁶ More importantly, “[t]o the extent that a citizen’s right to vote is debased, he is that much less a citizen.”²¹⁷

Reynolds has been criticized for its reliance on an individual rights framework, and perhaps rightly so.²¹⁸ But *Reynolds* is iconic in part because it is animated by the classical account of representation in which voters are expected to have the capacity to choose and do in fact choose their representatives. “As long as ours is a representative form of government,” the Court stated, “and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.”²¹⁹ *Reynolds*, like the Court’s other apportionment cases and its racial gerrymandering cases, reminds us that judicial intervention is necessary whenever the government attempts to change the subjects to suit the ruler, as opposed to allowing the subjects to pick their rulers. This is the traditional way of thinking about the problem of partisan gerrymandering. In the following section,

²¹⁰ See, e.g., Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 660, 672 (2002).

²¹¹ PITKIN, *supra* note 180, at 108.

²¹² *Id.* at 110.

²¹³ For a critical account, see Bertrall L. Ross II, *The Representative Equality Principle: Disaggregating the Equal Protection Intent Standard*, 81 FORDHAM L. REV. 175, 202–03 (2012).

²¹⁴ 377 U.S. 533, 536–37 (1964).

²¹⁵ *Id.* at 562.

²¹⁶ *Id.* at 565.

²¹⁷ *Id.* at 567.

²¹⁸ See, e.g., Issacharoff, *supra* note 152, at 630–31.

²¹⁹ *Reynolds*, 377 U.S. at 562.

we offer a new way of justifying judicial intervention that links partisan gerrymandering to the broader questions in election law.

B. Judicial Intervention as Restraint, Nonintervention as Partisan

Models of judicial review in the field of election law generally depict the Court as a democratic savior, willing and able to save our politics from its worst excesses. However, as we show in Part I, the Court has been at times reluctant, almost callously so, to address the structural pathologies of the democratic process. This reluctance, prominently articulated by Justice Frankfurter, counsels against the Court placing itself as a referee of partisan politics because to do so would harm the Court. Justiciability of law and politics claims would involve the Court continually in partisan disputes, which would threaten its legitimacy.

However, the proposition that the Court can refrain from refereeing partisan disputes by abstaining from supervising the ground rules of democratic politics is belied by our partisan era. Given the hyperpartisanship of our current political environment, in which political elites attempt to manipulate or rig electoral rules, norms, and practices in order to maximize their desired political outcomes,²²⁰ the courts will be continually enmeshed in partisan fights. This is the political reality of our moment. Partisans will manipulate electoral lines, implement strict voter identification rules, purge voting rolls, change voting hours, move polling places, modify registration rules, and so forth, for partisan gains.²²¹ Like birds of a feather, manipulative devices flock together.

A central lesson from the Court's experience with reapportionment frames our argument. Reflecting in his memoirs on what he considered to be the greatest case of his judicial tenure, Chief Justice Warren did not cite *Brown v. Board of Education*,²²² the case that many consider the most important and consequential case of the Warren Court, but *Baker v. Carr* and the one-person, one-vote cases.²²³ If African Americans had been able to vote, the *Brown* decision would not have been as momentous.²²⁴ As Chief Justice Warren reasoned, if Congress had passed

²²⁰ See RICHARD HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* 75–104 (2012); Ryan P. Haygood, *The Past as Prologue: Defending Democracy Against Voter Suppression Tactics on the Eve of the 2012 Elections*, 64 RUTGERS L. REV. 1019, 1028–58 (2012).

²²¹ See, e.g., Ari Berman, *There Are 868 Fewer Places to Vote in 2016 Because the Supreme Court Gutted the Voting Rights Act*, THE NATION (Nov. 4, 2016), <https://www.thenation.com/article/there-are-868-fewer-places-to-vote-in-2016-because-the-supreme-court-gutted-the-voting-rights-act/> [<https://perma.cc/MYL4-GRGZ>]; Vann R. Newkirk II, *Voter Suppression Is Warping Democracy*, THE ATLANTIC (July 17, 2018), <https://www.theatlantic.com/politics/archive/2018/07/poll-prri-voter-suppression/565355/> [<https://perma.cc/SgZH-JXF3>].

²²² 347 U.S. 483 (1954).

²²³ EARL WARREN, *THE MEMOIRS OF EARL WARREN* 306 (1977).

²²⁴ *Id.*

remedial legislation, such as voting rights laws, prior to *Brown*, “blacks and other minorities would have achieved their rights by the middle of the twentieth century.”²²⁵ And crucially for our purposes, “much of the emotional heat undoubtedly would have been avoided.”²²⁶

Chief Justice Warren drew from this experience that courts may impose limits on the political process even if they are indifferent or unconvinced that malapportionment violates the Constitution. The Court may not even be motivated by the harm of malapportionment as such. Rather, the Court may be concerned that malapportioned districts will lead to discrimination against African American voters in the political process, or that African American voters may not be able to press their claims in legislative arenas. As a consequence, the Court might need to adjudicate these disputes in the future, perhaps at a cost to the institution.

This lesson from the reapportionment cases is equally applicable in the gerrymandering context. A Court unconvinced by the substantive harms of partisan gerrymandering might nevertheless impose constitutional constraints on the practice. Without constraints, there will likely be secondary effects of partisanship — substantive disputes that would likely not arise except for the fact that the Court did not move to rein in partisan gerrymandering. These secondary disputes will likely make their way from the political process to the courts for adjudication and resolution. Within this framework, a Court concerned with its institutional credibility and hesitant to involve itself in partisan disputes is faced with two realistic choices. It can abstain from adjudicating the ground rules but address the secondary substantive cases that flow out of its refusal to set clear ground rules. Alternatively, it can set clear ground rules, which would likely result in fewer secondary disputes in the political process and therefore fewer cases flowing from the political process to the courts for adjudication. These options mean that the minimalist move — a little now to avoid more later — might be for the Court to set ground rules in order to limit or avoid these secondary claims. The Court should curb partisan gerrymandering to limit the propensity of political elites to manipulate election rules for partisan gains, thereby averting the need for the Court to adjudicate political disputes. Judicial restraint, in other words, counsels in favor of the justiciability of partisan gerrymandering claims.

Our argument is framed around two crucial points. First, the posture of nonintervention underestimates its expressive and consequential

²²⁵ *Id.* at 306–07.

²²⁶ *Id.* at 307. Scholars have made similar claims about the Court’s ability to implement broad racial equality in *Brown*. See, e.g., Akhil Reed Amar, Speech, *The Warren Court and the Constitution (with Special Emphasis on Brown and Loving)*, 67 SMU L. REV. 671, 681 (2014) (stating that the Court in *Brown* fashioned subrules to guide judges, litigants, and other actors charged with implementation in order to effectively implement a broad rule of racial equality).

dimensions. Political gerrymandering is the most salient and perhaps most consequential expression of the manipulation of electoral rules for partisan gain. If the Court does not rein in partisan gerrymandering, it will communicate to political elites not just that partisan gerrymandering is normatively acceptable, but also that partisan manipulation of electoral rules is permissible, as long as they can get away with it.²²⁷ By addressing the most visible manifestation of partisan-motivated manipulation, the Court can and will constrain the propensity of political actors to manipulate electoral rules for partisan gain. Intervening now will allow the Court to play a less interventionist role down the road because fewer or different cases will be presented for its review. Thus, judicial supervision of partisan gerrymandering claims bears the hallmarks of judicial restraint.

Second, judicial supervision in the field of law and democracy affects the behaviors of political elites and constrains their options.²²⁸ Noninterventionists, such as Justice Frankfurter in the reapportionment cases, have long worried that political elites will ignore judicial directives that are inimical to the interests of those elites. But Justice Frankfurter was wrong. Some political elites welcomed the Court's entry into the democratic process,²²⁹ and state legislatures complied with the directive of one person, one vote. The Court's racial gerrymandering cases are also instructive. In *Shaw v. Reno* and its progeny, the Court sent a message to political elites that it would strike down districts that were excessively gerrymandered along racial lines. Notwithstanding the political incentives, political elites responded and complied with the Court's message and refrained from constructing explicit racial gerrymanders. This is understandable because, as observers of the Court's political equality cases have remarked, "the possibility of judicial review exerts a pressure on the legislatures to behave."²³⁰ Moreover, political elites are risk averse. They are not likely to enact self-interested rules that they know are likely to be struck down by the courts. If the Court communicates

²²⁷ See ANSOLABEHERE & SNYDER, *supra* note 208, at 18 ("It is vitally important that the courts remain open to appeals in cases involving political representation, as difficult as it may be to resolve the claims. The threat of judicial intervention hangs above the legislatures like the sword of Damocles. Removing that threat only invites those in power to do what they can to stay there.").

²²⁸ See, e.g., *id.*; see also Morgan Kousser, *Reapportionment Wars: Party, Race, and Redistricting in California, 1971-1992*, in RACE AND REDISTRICTING IN THE 1990S 134, 186 (Bernard Grofman ed., 1998).

²²⁹ BERNARD SCHWARTZ, *SUPREME COURT: EARL WARREN AND HIS SUPREME COURT — A JUDICIAL BIOGRAPHY* 425 (1983) (describing President John F. Kennedy's reaction to *Baker v. Carr* and his public statement that "[t]he right to fair representation and to have each vote count equally . . . is, it seems to me, basic to the successful operation of a democracy").

²³⁰ ANSOLABEHERE & SNYDER, *supra* note 208, at 286.

to legislatures that it is serious about eliminating the partisan manipulation of electoral rules, political elites and legislatures will strike different bargains.

This last point makes clear the need for judicial intervention in our partisan age, in which the impulse of political elites to use electoral rules to acquire and secure political power is almost irresistible and self-reinforcing. Though standard democratic theory focuses us on the importance of ideas, contemporary democratic practice emphasizes the importance of winning at almost all costs. Winning is all that matters.²³¹ This is particularly true in the context of elections. Voter turnout in our current political environment is the pivot around which many things turn. Political campaigns in the age of partisanship are less about persuading voters to join your side; rather, as Professor Barbara Sinclair has persuasively demonstrated, they aim to mobilize the base — convince more of the people who are already on your side to turn out to vote than the ones who are on the other side.²³² Importantly, anger and emotion are significant to political participation.²³³

Because elections are more about turnout than persuasion, because voters are differentially situated on the basis of their partisan identity, and because winning is all that matters, partisan elites have an incentive to use election law, practice, and custom strategically for rent-seeking purposes — to acquire political power. Any electoral rule, practice, or custom that is outcome determinative — that will allow political elites to acquire and maintain power — is ipso facto a candidate for manipulation. As Sinclair stated in a comprehensive analysis of political polarization in Congress, “[e]ach side really does see the other’s policy and electoral success as disastrous for the country; and this sometimes generates a feeling that anything goes, anything is justified to avert such a catastrophe.”²³⁴

This observation is particularly apt in the domain of election law where the rules are directly relevant to the acquisition of political power. Election law can be used to maximize the probability that one’s partisans will turn out and minimize the probability that the other side’s partisans will turn out. Given the importance of turnout, the sophistication of methods used to identify likely partisans, and the ease with

²³¹ See MASON, *supra* note 183, at 139–40 (“[T]he current alignment of social identities within the two parties is promoting a greater focus on partisan victory than on the good of the nation.”).

²³² BARBARA SINCLAIR, *PARTY WARS: POLARIZATION AND THE POLITICS OF NATIONAL POLICY MAKING* 349–50 (2006). Professor James Gardner has also noted the increased focus on on-the-ground organizing, but characterizes elections as tabulative events, in which the purpose of voter turnout campaigns is to ensure that the final vote accurately reflects the political preferences of voters before the campaign. See GARDNER, *supra* note 175, at 102–06.

²³³ MASON, *supra* note 183, at 86 (“[A]nger and enthusiasm are the primary emotional drivers of political action . . .”).

²³⁴ SINCLAIR, *supra* note 232, at 346.

which we can predict the effects of electoral rules on turnout, the opportunity for political elites to rent-seek is ubiquitous. For example, we know that on average, photo identification requirements are likely to have a stronger negative impact on voter turnout within the sociodemographic groups that tend to identify with the Democratic Party than on those who tend to identify with the Republican Party.²³⁵ Because political elites know, *ex ante*, the likely distributional effects of electoral rules, the insiders will attempt to manipulate electoral rules to maintain or acquire power with minimal restraint.

As partisans press their advantage and increasingly change the electoral rules and norms to maximize partisan gain, the political-process losers will turn to the courts for redress. They will do so whether or not the courts provide a realistic opportunity for redress; the partisans will view these fights as existential. Recall Sinclair's observation that each side really does see the other side's success as disastrous for the country.²³⁶ Moreover, political losers might feel especially aggrieved to the extent that a particular outcome was achieved by changing or manipulating electoral rules. Additionally, as Professor Gillian Hadfield stated in a slightly different though no less apt context, "people who feel as though the rules don't care about them don't care about the rules."²³⁷ Thus, not only will partisans press their claims in the courts, they might do so with greater expectation and desperation. They will expect that courts' responses will be commensurate to the threat — to the rule of law, to individual rights of political participation — posed by "the other side," as they see it. Arguments about election law that were once "off the wall," and thus not legally viable, will move "on the wall," becoming increasingly plausible as losing parties challenge election rules in court.²³⁸

The Court's posture of nonintervention in the age of partisanship rests on the presumption that the Court can preserve its legitimacy and neutrality by remaining outside the political process and avoiding the influence of that process. That presumption is false. Federal judges

²³⁵ See Bernard L. Fraga & Michael G. Miller, Who Does Voter ID Keep from Voting? 1, 5–6 (July 23, 2018) (unpublished manuscript) (on file with the Harvard Law School Library); see also *id.* at 28–30 (analyzing the negative effects of voter identification requirements on turnout among minority voters in Texas).

²³⁶ See *supra* note 234 and accompanying text.

²³⁷ GILLIAN K. HADFIELD, RULES FOR A FLAT WORLD: WHY HUMANS INVENTED LAW AND HOW TO REINVENT IT FOR A COMPLEX GLOBAL ECONOMY 79 (2017).

²³⁸ See Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, THE ATLANTIC (June 4, 2012), <https://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/> [<https://perma.cc/3XMN-WMPE>] ("Off-the-wall arguments are those most well-trained lawyers think are clearly wrong; on-the-wall arguments, by contrast, are arguments that are at least plausible, and therefore may become law, especially if brought before judges likely to be sympathetic to them.").

are nominated by a political process that is increasingly viewed through the lens of partisan polarization. For example, there is growing empirical evidence of rising dissatisfaction with the Supreme Court that is associated with partisan polarization.²³⁹ Additionally, a pair of researchers concluded that the public sees the Court as highly politicized and prefers Justices chosen on political and ideological grounds.²⁴⁰ You have your Justices, we have our Justices, and the goal is to have more Justices than you do. The polarization over the Court is likely to increase as we currently have — not surprisingly, in light of the politicization of the judicial nominating process — ideological and partisan alignment among the Justices; the Court’s conservatives were appointed by Republican presidents and the Court’s liberals were appointed by Democratic presidents.

The perception of the Court as political is now a staple of intellectual elites, and increasingly of legal elites as well. One need only peruse journalistic accounts of recent Court cases to see how intellectual elites view the Court. The titles alone tell the story. After *Husted v. A. Philip Randolph Institute*,²⁴¹ the Ohio voter purge case, we saw the following examples: “Supreme Court’s Conservative Justices Uphold Ohio’s Voter Purge System”²⁴² and “The Supreme Court’s *Husted* Decision Will Make It More Difficult for Democrats to Vote.”²⁴³ A brief internet search uncovers many other examples. They are now commonplace. The most damning piece came from Professors Lee Epstein and Eric Posner, writing in the opinion pages of *The New York Times*. They asked, “If the Supreme Court Is Nakedly Political, Can It Be Just?”²⁴⁴ They documented how the Court “has come to be rigidly divided by both ideology and party” and wondered whether it could “sustain public confidence for much longer.”²⁴⁵ The Justices are now exactly where Justice Frankfurter did not want them to be.

²³⁹ See Eric Posner, *The Supreme Court’s Loss of Prestige*, SLATE (Oct. 7, 2015, 5:04 PM), http://www.slate.com/articles/news_and_politics/view_from_chicago/2015/10/the_supreme_court_is_losing_public_approval_and_prestige.html [https://perma.cc/RC3H-QMUK].

²⁴⁰ See Brandon L. Bartels & Christopher D. Johnston, *Political Justice? Perceptions of Politicization and Public Preferences Toward the Supreme Court Appointment Process*, 76 PUB. OPINION Q. 105, 112 (2012).

²⁴¹ 138 S. Ct. 1833 (2018).

²⁴² German Lopez, *Supreme Court’s Conservative Justices Uphold Ohio’s Voter Purge System*, VOX (June 11, 2018, 2:13 PM), <https://www.vox.com/policy-and-politics/2018/6/11/17448742/ohio-voter-purge-supreme-court-ruling> [https://perma.cc/N5RP-83VN].

²⁴³ Jeffrey Toobin, *The Supreme Court’s Husted Decision Will Make It More Difficult for Democrats to Vote*, NEW YORKER (June 11, 2018), <https://www.newyorker.com/news/daily-comment/the-supreme-courts-husted-decision-will-make-it-more-difficult-for-democrats-to-vote> [https://perma.cc/97P9-PVNU].

²⁴⁴ Lee Epstein & Eric Posner, Opinion, *If the Supreme Court Is Nakedly Political, Can It Be Just?*, N.Y. TIMES (July 9, 2018), <https://nyti.ms/2J8cakV> [https://perma.cc/T7NW-GAM9].

²⁴⁵ *Id.*

Consider in this vein the recent battles over confirmation. The sudden death of Justice Scalia led to an unexpected though ultimately inescapable change in the norms of the Senate. Then-President Obama sent a nominee to the Senate, but Republican leaders refused to grant him a hearing.²⁴⁶ Some Republican Senators took their opposition further and promised to block any nominee sent to the Senate by a potential President Hillary Clinton.²⁴⁷ The debate over the nomination of then-Judge Kavanaugh to replace Justice Kennedy on the Court was similarly polarized.²⁴⁸ One wonders whether Democrats will retaliate if they re-gain control of the Senate and another Supreme Court vacancy arises under a Republican president. Professor Richard Hasen has suggested “Democrats may have to turn to more radical measures — like adding more justices to the court . . . — when they come back into power in order to make up for the Merrick Garland nomination that was blockaded by [Senator] McConnell in 2016.”²⁴⁹ Two prominent Yale law professors, Ian Ayres and John Witt, have recently argued that Democrats should add two seats to the Court when they regain the presidency and the Senate as the party’s response to the “Garland travesty.”²⁵⁰ The game is now afoot.

Soon after the end of the last Term, another prominent law professor, Harvard’s Mark Tushnet, wrote a brief yet scathing account of the Court’s jurisprudential turn.²⁵¹ In a blog post entitled “The Standing-on-One-Leg Version of Constitutional Law, Circa and Post-2018,” Tushnet described the state of constitutional law as follows:

1. Statutes, policies, and practices that strengthen the Republican Party, and those that weaken the Democratic Party, are constitutionally permissible.
2. Statutes, policies, and practices that strengthen the Democratic Party are unconstitutional.

²⁴⁶ See Adam Liptak, *Study Calls Snub of Obama’s Supreme Court Pick Unprecedented*, N.Y. TIMES (June 13, 2016), <https://nyti.ms/1rDi6R> [<https://perma.cc/WB5D-CVJ4>].

²⁴⁷ David A. Graham, *What Happens If Republicans Refuse to Replace Justice Scalia?*, THE ATLANTIC, (Nov. 1, 2016), <https://www.theatlantic.com/politics/archive/2016/11/whats-the-opposite-of-court-packing/506081/> [<https://perma.cc/FY2X-CWL2>].

²⁴⁸ See Mark Landler & Maggie Haberman, *Brett Kavanaugh Is Trump’s Pick for Supreme Court*, N.Y. TIMES (July 9, 2018), <https://nyti.ms/2m8RJeG> [<https://perma.cc/3NVT-E6Q4>].

²⁴⁹ Richard L. Hasen, *The Only Thing that Might Stop Trump from Replacing Kennedy with a Scalia Clone*, SLATE (June 27, 2018, 3:40 PM), <https://slate.com/news-and-politics/2018/06/trump-will-replace-kennedy-with-a-scalia-clone-only-one-thing-might-stop-him.html> [<https://perma.cc/9K7R-ZGNF>].

²⁵⁰ Ian Ayres & John Fabian Witt, Opinion, *Democrats Need a Plan B for the Supreme Court. Here’s One Option.*, WASH. POST (July 27, 2018), <https://wapo.st/2mQH0pA> [<https://perma.cc/57SF-9YFL>]. Professors Ayres and Witt explain: “By connecting the proposal to the constitutional wound of the Senate’s failing to consider the nomination of Merrick Garland in 2016, Democrats can apply crampions to stop the partisan slide to ever more justices.” *Id.*

²⁵¹ Mark Tushnet, *The Standing-on-One-Leg Version of Constitutional Law, Circa and Post-2018*, BALKINIZATION (June 27, 2018, 3:53 PM), <https://balkin.blogspot.com/2018/06/the-standing-on-one-leg-version-of.html> [<https://perma.cc/U4WM-H2DF>].

3. If leading Republicans are indifferent about a statute, policy, or practice, and leading Democrats favor it, and if the statute, policy, or practice does not strengthen the Democratic Party, the statute, policy, or practice might or might not be constitutionally permissible.

4. If leading Republicans are indifferent and leading Democrats oppose a statute, policy, or practice, it might be unconstitutional.

All the rest is commentary.²⁵²

The Roberts Court is increasingly regarded as a *Republican* Court by the journalists who report its cases²⁵³ and by some of the legal elites who comment on its rulings.²⁵⁴ Given the flow of public opinion from elites to the masses,²⁵⁵ it won't be long before the public also forms a view of the Roberts Court as a Republican Court; Republican voters will find the Court congenial, but Democrats will not. The potential harm to the Court is real and maybe even probable. The Court cannot put its head in the sand and be agnostic about the state of American politics. And if Justice Kagan's recent public comments are indicative, these issues are not too far from the minds of the Justices.²⁵⁶

Even if the Court is ambivalent about limiting political gerrymandering, it ought to do so in order to address the second-order effects of this expression of partisanship, the manipulation of electoral rules for partisan gain. Partisan gerrymandering is the most salient expression of the normativity of partisanship as a justification for constructing electoral rules in order to maintain or acquire political power. Whether the Court believes it or not, the practice of creating electoral districts simply for the purpose of partisan advantage sends a clear message to political elites that partisanship is justifiably the coin of the realm. There are spillover effects for other areas of election law; the failure to hold the line on partisan manipulation in the domain of political gerrymandering sends a message of tacit approval of the manipulation of electoral rules

²⁵² *Id.*

²⁵³ See, e.g., Adam Liptak, *Court Under Roberts Is Most Conservative in Decades*, N.Y. TIMES (July 24, 2010), <https://nyti.ms/2N3nrKd> [<https://perma.cc/QKV6-63JC>] ("In its first five years, the Roberts court issued conservative decisions 58 percent of the time. And in the term ending [in 2009], the rate rose to 65 percent, the highest number in any year since at least 1953.").

²⁵⁴ See, e.g., Michael J. Gerhardt, *The New Religion*, 40 CREIGHTON L. REV. 399, 416–17 (2007) ("Roberts, Alito, Scalia, and Chief Justice Rehnquist . . . were all political appointees in the Justice Department chosen at times when the only people picked as judges or justices had to have the right kinds of credentials and ideological convictions.").

²⁵⁵ See Druckman et al., *supra* note 199, at 74.

²⁵⁶ Justice Kagan stated that the partisan battles over the judicial confirmation process make the Justices look like "junior varsity politicians." Jamie Ehrlich, *Kagan: Confirmation Gridlock Makes Supreme Court Look Like "Junior Varsity Politicians"*, CNN (July 25, 2018, 3:51 PM), <https://www.cnn.com/2018/07/25/politics/kagan-kavanaugh-junior-varsity-politicians/index.html> [<https://perma.cc/G836-7USW>]. She lamented that the confirmation of the Justices along partisan lines "make[s] it seem that we're an extension of the political process." *Id.* She went on to say: "Long-term I think that's very unhealthy for the court." *Id.*

for maintaining or acquiring partisan power in other domains.²⁵⁷ The failure of the Court to rein in the practice of political gerrymandering will only encourage political elites to press their partisan advantage further.²⁵⁸ Recall here Professors Shanto Iyengar and Sean Westwood's claim that partisan animus surpasses racial animus in both belief and motivation because there are no norms to constrain partisan impulses.²⁵⁹ Fundamentally, both nonintervention and judicial supervision are interventionist choices that matter for our constitutional democracy. The question is not whether or not to intervene, but whether to intervene a little — by shutting the door on rigging electoral rules for partisan gain — or a lot — by adjudicating secondary claims.

CONCLUSION

Soon after the Supreme Court ushered in a new era of judicial supervision of democratic politics, some Justices immediately recognized that “[t]he question of the gerrymander is the other half of *Reynolds v. Sims*.”²⁶⁰ Half a century later, the question remains. The political gerrymandering cases are the logical extension of the reapportionment revolution and the *Reynolds* promise of substantial equality. However compelling judicial intervention was in *Baker*, it is even more so now.

As we have argued here, judicial abstention cannot be justified by the narrative of nonintervention. Limiting partisan gerrymandering is important for its own sake. But it is also important to save the Court from having to adjudicate second-order partisan cases that are the product of manipulation of electoral rules for the purposes of partisan gain. The Court will increasingly be thrust in the middle of contentious partisan disputes over electoral laws. This is no longer 1986, when *Bandemer* was decided, or 2004, the year of *Vieth*. “Sometimes,” as Ely aptly put it, “more is less.”²⁶¹ The Court has intervened successfully in the political process before. The Court's intervention in *Baker* and *Reynolds* is widely regarded as its finest hour, rivaled perhaps by its intervention in *Brown*. It can and should intervene again. It ignores this important role in our politics at its own peril.

²⁵⁷ Michael Kang has made an argument along the same lines. See Kang, *supra* note 28, at 411–12.

²⁵⁸ The similarities to the reapportionment revolution are unmistakable. See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 287 (2000) (“It was unrealistic to expect that an undemocratic distribution of power could be reformed democratically. Consequently, if the judiciary did not act, if it failed to establish a yardstick for assessing the democratic content of electoral structures, the door would be open to a wide range of abuses.”).

²⁵⁹ See *supra* notes 192–95 and accompanying text.

²⁶⁰ *Whitcomb v. Chavis*, 403 U.S. 124, 176 (1971) (Douglas, J., dissenting in part and concurring in the result in part) (footnote omitted).

²⁶¹ ELY, *supra* note 164, at 125.

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